Supreme Court, U.S.
FILED

952006 JUN 13 1996

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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAMUEL FRANK, Sheriff, Orange County, Vermont,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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123 pp

QUESTION PRESENTED

Whether the delegated powers of Congress, as construed in *New York v. United States*, 505 U.S. 144 (1992), include the power which Congress exercised in the Brady Law, 18 U.S.C. §922(s)(2), (6)(B) and (C), to prescribe duties for state Chief Law Enforcement Officers (CLEOs), beyond those duties prescribed in the state laws which created their positions, including compelling the CLEO to make a reasonable effort to ascertain whether individuals may lawfully purchase handguns; thereafter to destroy the records of such transaction, or to provide a written explanation for an adverse determination.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Sheriff Samuel Frank and the United States of America. No parent companies and wholly or non-wholly owned subsidiaries of either exist.

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Brady Handgun Violence Protection
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Petitioner, Sheriff Samuel Frank requests that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996) and is reproduced in the Appendix ("App.") at 1a. The opinion of the United States District Court is reported as *Frank v. United States*, 860 F. Supp. 1030 (D. Vermont. 1994) and is reproduced in the Appendix at 44a.

JURISDICTION

On March 15, 1996, the Court of Appeals affirmed in part and reversed in part the judgment of the District Court, thereby upholding the validity of the statutory provisions in question. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, §8 of the Constitution of the United States provides:

> Congress shall have the power ... to regulate Commerce with foreign Nations, and among the several States....

Amendment 10 to the Constitution of the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pub. L. 103-159, 107 Stat. 1536 (1993), codified as 18 U.S.C. §§922(s), 924, 925A, is reproduced in full at App. 78a. As codified, it provides in relevant part:

> 18 U.S.C. 922(s):
>
> (1) .... it shall be unlawful for any ... licensed dealer to sell, deliver, or transfer a handgun... unless....
>
> (A) (i) the transferor has--
>
> (I) received from the transferee a statement of the transferee containing the information described in paragraph (3);.....
>
> (III) within 1 day ... provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee....
>
> (2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.
>
> 18 U.S.C. §924(5):
>
> Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.".

18 U.S.C. § 925A:

> Any person denied a firearm pursuant to subsection (s) or (t) of section 922--
>
> .....
>
> (2) who was not prohibited from receipt of a firearm ... may bring an action against the State or political subdivision responsible for ... denying the transfer ... for an order directing that ... the transfer be approved.... In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Federal law prohibits the transfer of firearms to, or possession by, members of certain classes of restricted persons, including, *inter alia*, convicted felons, persons dishonorably discharged from the armed forces, adjudicated mental defectives, illegal aliens, unlawful drug users, fugitives from justice, and persons under certain forms of domestic restraining orders. 18 U.S.C. §922(d), (g), & (n).

In the past, purchasers were required to complete an official questionnaire, on a form prescribed by the federal government, verifying that they were not included in any of the classes of restricted persons. In 1993 Congress enacted the "Brady Law," Pub. L. 103-159, 107 Stat. 1536 (1993), which provided for an official verification, through an examination of available records, of the proposed purchaser's eligibility to possess a firearm. To this end, the law requires the U.S. Justice Department to establish a data base of prohibited persons by the year 1999. Before that time, the law creates an interim system which requires that the background investigations, on persons seeking to purchase handguns, be conducted by the

"Chief Law Enforcement Officer" (CLEO) for the district in which the proposed purchaser resides. The term "Chief Law Enforcement Officer" is defined as ". . . the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. §922(s)(8).

During the operation of the interim system, the proposed purchaser must fill out a form indicating an intent to purchase a handgun. The dealer must submit this information to the Chief Law Enforcement Officer of the place where the proposed purchaser resides. 18 U.S.C. §922(s)(1)(A)(iii). The CLEO is required to make ". . . a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. §922(s)(2). The U.S. Attorney General has designated two Federal databases as the "national system" which the CLEO must check. Order No.1853-94, at 59 *Federal Register* 9498 (Feb. 28, 1994).

If the CLEO finds that the proposed sale would not violate Federal, State or local law, he is required to destroy the form and any references to it within twenty business days. 18 U.S.C. §922(s)(6)(B). On the other hand, if the CLEO finds that the proposed purchaser is ineligible to receive a handgun, he must inform the dealer and, if the purchaser requests, provide a written justification of his findings within 20 business days. 18 U.S.C. §922(s)(6)(C). Should the CLEO err in barring a purchase, the statute creates a Federal cause of action against his jurisdiction for correction and recovery of attorneys' fees. 18 U.S.C. §925A.

Sheriff Sam Frank is the elected Sheriff of Orange County, Vermont. Orange County has a population of approximately 26,000, and an area of 992 square miles. The

County has three full time law enforcement officers, including the Sheriff and two deputies. The Vermont legislature has prescribed the duties of a sheriff at 24 Vermont Statutes Annotated, Chap. 5, subchap. 5. These include a duty to serve as bailiffs in courts in the county, transport prisoners, serve legal process, as well as to serve as peace officers for the county. Sheriff Frank, or his deputy, must spend from 15 minutes to six hours conducting background checks, and the workload, with respect to background checks, has doubled since the effective date of the Brady Law. App. 45a.

In May, 1993, Petitioner commenced an action in the United States District Court, District of Vermont, invoking its jurisdiction under 28 U.S.C. § 1331. He sought declaratory relief to establish, *inter alia*, that 18 U.S.C. §922(s) exceeds Congress's Article I powers and violates the Tenth Amendment. He also sought an injunction against its enforcement.

The District Court (Parker, J.), relying upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), issued its decision, holding, in pertinent part, that those sections of 18 U.S.C. §922(s) which impose ministerial duties upon Chief Law Enforcement Officers is unconstitutional, permanently enjoined the enforcement of same in the District of Vermont, and upheld the remainder of the statute as severable. App., at 44a.

The Court of Appeals reversed in part and affirmed in part, the judgment of the District Court. The Court of Appeals for the Second Circuit found that the duties imposed by the Brady law do not, in fact, exceed the delegated powers of Congress, or violate the 10th Amendment.

The question presented in this case has been reviewed in other Circuits. The Ninth Circuit, in *Mack v. U.S.*, and

Printz v. U.S. , 66 F.3d 1025 (9th Cir. 1995), held that the duties which the Brady law compels CLEOs to perform did not violate the 10th Amendment, or exceed the delegated powers of Congress. On the other hand, in a decision issued 6 days after the decision in the instant case, the Fifth Circuit, in *Koog v. U.S.*, and *McGee v. U.S.*, 79 F.3d 452 (5th Cir. 1996), held that the interim duties, including the duty to perform a background check, the destruction of records and the duty to furnish written justification for denials, violate the constitution.

The Solicitor General, in the *Brief of the United States*, in the Petition styled *Printz v. United States*, docket #95-1478, which involves the question which is presented in the instant case. concludes that this is a question which should be resolved and that *certiorari* should be granted.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT OF OPINION IN THE CIRCUITS ON THE CONSTITUTIONALITY OF AN ACT OF CONGRESS

This Court should grant the writ of certiorari because there is a conflict between the Circuit Courts on a question which involves the delegated powers of Congress, under Article I, section 8, cl.3 of the Constitution, and the reserved powers of the States, under the 10th Amendment to the Constitution. As noted, *supra*, the decision of the Second Circuit in the instant case, the decision of the Ninth Circuit, in *Mack* and *Printz*, *supra*, are precisely contrary to the decision in the Fifth Circuit, in *Koog* and *McGee*, supra. Further, the decisions of the Second and Ninth Circuits are not congruent with the decision of this Court in *New York v. United States*, 505 U.S. 144 (1992). In such case, it is appropriate for the Supreme Court to grant certiorari to resolve the conflict. *Waterman Steamship Corp. v. U.S.*, 381 U.S. 252, 258 (1965); *Federal Trade Commission v. Flotill Products*, 389 U.S. 179 (1967).

II

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE SECOND CIRCUIT IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *NEW YORK V. UNITED STATES*

A.

In an opinion on the same issue, with a contrary result, the Court of Appeals for the Fifth Circuit, in *Koog v. U.S.*, 79 F. 3d 452 (5th Cir. 1996), held that the Brady Law, to the extent that it compels Chief Law Enforcement Officers to perform ministerial duties, is unconstitutional. The Fifth Circuit based its decision on the decision of this Court in *New York v. U.S.*, 112 S. Ct. 2408 (1992), which, it said, was ". . . central to the question before us." *New York* is also central to this case.

In *New York* the issue was a challenge to the Low-Level Radioactive Waste Amendments of 1985. This statute provided several incentives to induce States to conform with the directives of the federal government on the disposal of nuclear wastes. The Act offered financial grants to States which complied. It provided for federal pre-emption in instances in which a State chose not to comply. This Court found that these provisions were within the permissible powers of Congress, and did not transgress the powers reserved under the 10th Amendment.

The Act also provided that States could choose whether to enact regulations, as prescribed by Congress, or take title to the waste from the parties who generated it, and assume

liability both for the disposal of such wastes, and for any damages. This provision was found to lie outside of the enumerated powers and to be inconsistent with the Tenth Amendment.

In reaching this decision, this Court distinguished those Tenth Amendment cases in which the issue was the authority of Congress to subject state governments to generally applicable laws. These cases include *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US.. 528 (1985)(Fair Labor Standards Act); *Fry v. U.S.*, 421 U.S. 542 (1975)(wage stabilization), and *South Carolina v. Baker*, 485 U.S. 505 (1988)(tax exemption on the interest on municipal bonds). *Id.*, at 2420. The Court found these cases inapposite since the legislation at issue, in *New York*, was not applicable to private parties. Instead the issue was ". . .the circumstances under which Congress may use the States as implements of regulation." *Id.*

The Court began its analysis by observing that "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.*, at 2420, citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, at 288 (1981).

Congress may, however, use a variety of means to induce states to assist in regulatory programs. For example, under the spending power, "Congress may attach conditions to the receipt of federal funds." *Id.* Or Congress may offer States the choice of regulating in accordance with Congressional wishes, or having State regulation pre-empted by federal regulation. *Id.*, at 2424.

In *Hodel*, and in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (FERC), there were

incentives offered to the States for undertaking certain regulatory programs. There was also the option of federal pre-emption if the States chose not to act. In neither case were the States compelled to enact legislation, nor to promulgate regulations. In fact, the court observed, ". . . this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.*

Such a command is not permissible because the power of the national government operates directly upon the people, not on the States.

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority . . . to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.
>
> * . . . . . *
>
> The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce. *Id.*, at 2423.

After explaining the principles to be applied in construing the Tenth Amendment, the Court then addressed the arguments of the Government in defense of the "take title" provisions, and against the prohibition on such legislation.

First, the Government argued that this prohibition can be overcome if the federal interest is important enough. The Court responded:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents. *Id.*, at 2429.

The Government also argued that ". . . the Constitution does, in some circumstances, permit federal directives to state governments." The Court responded that "(v)arious cases are cited for this proposition but none support it." *Id.*

The Brady law compels State officers (Chief Law Enforcement Officers, or "CLEOs") to perform a background investigation of potential handgun purchasers, then either to destroy the records of the investigation if the result is negative, or furnish, if requested, a written explanation if the potential purchaser appears to be ineligible to possess a firearm. Like the "take title" provisions in *New York*, the Brady Law is a direct, and unavoidable command to state officials. Like the "take title" provisions, it violates the Tenth Amendment and exceeds the Commerce Clause powers.

B.

In the instant case, the Second Circuit began its analysis with the observation that "(t)o help navigate safely through the murky waters of Tenth Amendment doctrine, it is necessary to

dispel the notion that the federal government may never compel action by state officials." *Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996), at 825. This flatly ignores the *New York* Court's response to the same assertion, *viz.*, "(v)arious cases are cited for this proposition but none support it." *New York*, supra, at 2429.

The Court of Appeals attempts to support this proposition with several examples of decisions in which burdens appear to have been imposed upon States. There are three which are central to its reasoning.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US.. 528 (1985), the issue was the applicability of the Federal Fair Labor Standards Act, a law of general application, to a municipal transit authority. It is inapposite. The Brady Law background check duties apply only to state officials.

In *South Carolina v. Baker*, 485 U.S. 505 (1988), the issue was the exemption, from federal income tax, of income from municipal bonds. It is inapposite. First, there is a specific constitutional grant of authority to Congress to "lay and collect taxes." Art I, section 8, cl. 1. There is also a constitutional grant of authority to "make all laws which shall be necessary and proper for carrying into execution" the granted power. U.S. Constitution, Art I, section 8, cl.18. There is no such grant to give direct commands to state officials.

In *Testa v. Katt*, 330 U.S. 386 (1947), this Court held that a State court is required to enforce federal law. It is inapposite. The Constitution provides, that the "Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges of every state shall be bound thereby." U.S. Constitution, Article VI, cl. 2. There is no provision binding

state executive or legislative branch officials to the commands of Congress.

The Second Circuit also cites *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). It is not clear, from the decision, what principle this case was thought to support. In that case the issue was the applicability of the federal Age Discrimination in Employment Act to Missouri judges who were required, by the State Constitution, to retire at age 70. The case is not only inapposite, but may be taken to support the opposing view. The right of the people to determine the qualifications of state officials is an integral element of a republican government. There is a Constitutional guarantee of a republican form of government, U.S. Constitution, Art. IV, sect. 4. Federal interference would violate the Tenth Amendment.

The Second Circuit does recognize a very narrow field in which Congress cannot act:

> Certain kinds of federal action are by their very nature so intrusive as to violate the Tenth Amendment regardless of how light a burden is imposed on state officials. Coercive commandeering to the States' legislative processes that effectively compels the States to adopt a federal regulatory scheme is one example. *Frank*, 78 F.3d 815 (2nd Cir. 1996), at 826.

Under the structural limits test, the Court found the Brady Law did not violate the Tenth Amendment because it does not "direct the States to enact legislation or to promulgate regulations." Further, it held that the background check did not transgress the decision in *New York, supra*, because ". . . the Brady Act is an exercise of Congress's power to regulate individuals." *Id.*, at 827.

While it is true that most provisions of the Brady Law are of general application, the provisions relating to Chief Law Enforcement Officers is only applicable to them in their capacity as creatures of State law, and not as individuals. Further, the Brady Law does "commandeer the legislative process" by augmenting the duties which the legislature of the State prescribes for CLEOs by adding duties which the legislature has declined to prescribe.

The Second Circuit also discussed a subjective, quantitative limits test. "Directives aimed solely at States have been upheld if they do not place any particularly 'onerous burden' on the State." *Id.*, citing *FERC*, *supra*, 2142. The Second Circuit found that the Brady Law does not impose such an "onerous burden" on CLEOs. Counsel is unable to find support for an "onerous burden" standard in the four corners of *New York*. However, assuming, *arguendo*, that there is such a lower threshold for those statutes which do not violate the structural limits of the Tenth Amendment, the Brady Law does, in fact, impose an onerous burden.

First, when Congress was considering the Brady Bill, it rejected an amendment which would have forced the Federal Bureau of Investigation to conduct the background checks. H.R. Rep. No. 103-344, 103rd Cong., 1st Sess., at 7 (1993). If the burden is too onerous for the F.B.I., with its financial, material, and personnel resources, then it is, *a fortiori*, onerous for a Sheriff with two full time deputies and 992 square miles to patrol.

Further, the Brady Law, at 18 U.S.C. §925A, provides for a federal cause of action in cases of erroneous determinations of ineligibility. That is, it involuntarily imposes liability upon Orange County, and the State of Vermont. If exposure to unlimited money damages is not an "onerous burden," the Second Circuit does not explain why it is not. In

fact, the liability provision would appear to "commandeer the legislative processes." It commits the financial resources of the people of Orange County, and of Vermont, under conditions over which the people have no control. It mandates liability for compulsory actions which the people are not permitted to prescribe, alter, or evade.

C.

There is a conflict in the Circuits on the question which is presented in the instant case, a question regarding the constitutionality of an act of Congress. The Solicitor General agrees that certiorari should be granted on this question. The Court of Appeals, for the Second Circuit, in the instant case, has not followed the decision in *New York*. The Brady Law violates the Tenth Amendment, and it exceeds the powers granted Congress in the Commerce Clause.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully Submitted,

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APPENDIX

78 F.3d 815

SAMUEL FRANK,
Plaintiff-Appellee-Cross-Appellant, v. UNITED

STATES OF AMERICA,
Defendant-Appellant-Cross-Appellee.

Docket Nos. 95-6019, 95-6023

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

; 1996 U.S. App. LEXIS 4615

August 28, 1995, Argued

March 15, 1996, Decided

PRIOR HISTORY: [*1] Defendant, the United States, appeals from a judgment of the United States District Court

for the District of Vermont (Parker, C.J.) declaring that the background check requirement for "chief law enforcement officers" under the Brady Handgun Violence Prevention Act of 1993 violates the Constitution and enjoining its enforcement in Vermont. Plaintiff, Samuel Frank, sheriff of Orange County, Vermont, cross-appeals from the district court's determination that he has no standing to challenge the statute's criminal penalty provisions under the Fifth Amendment and that the background check requirement is severable from the remainder of the Brady Act.

DISPOSITION: Affirmed, in part, and reversed, in part.

COUNSEL: MARK B. STERN, Washington, D.C. (Sean A. Lev, Stephanie R. Marcus, Appellate Staff, Civil Division, Department of Justice, Washington, D.C.; Frank W. Hunger, Assistant Attorney General, Walter Dellinger, Assistant Attorney General, Richard L. Shiffrin, Deputy Assistant Attorney General, H. Jefferson Powell, Stuart M. Benjamin, Office of Legal Counsel, Washington, D.C.; Charles R. Tetzlaff, United States Attorney, Civil Division, Burlington, Vermont, of counsel and on the brief), for Appellant United [*2] States of America.

ANDREA L. GALLITANO, Barre, Vermont (David A. Otterman, Otterman and Allen, Barre, Vermont, of counsel), for Appellee Samuel Frank.

Randolph D. Moss, Washington, D.C. (Anthony G. Brown, James S. Campbell, Wilmer, Cutler & Pickering, Washington, D.C.; Dennis A. Henigan, Gail A. Robinson, Center to Prevent Handgun Violence, Legal Action Project, Washington, D.C., of counsel), filed a brief on behalf of Handgun Control, Inc., Center to Prevent Handgun Violence,

International Association of Chiefs of Police, Major Cities Chiefs, National Organization of Black Law Enforcement Executives, Fraternal Order of Police, National Association of Police Organizations, National Troopers' Coalition, Police Executive Research Forum, and Federal Law Enforcement Officers' Association as Amici Curiae.

JUDGES: Before: CARDAMONE, MINER, and CALABRESI Circuit Judges, Judge Miner concurs in a separate opinion.

OPINIONBY: CARDAMONE

OPINION: CARDAMONE, Circuit Judge:

The United States appeals from a judgment entered August 2, 1994 in the United States District Court for the District of Vermont (Parker, C.J.) declaring unconstitutional that section of the Brady Handgun Violence Prevention Act [*3] of 1993 (Brady Act or Act) which requires background checks of potential handgun buyers, Pub. L. No. 103-159, @ 102(a)(1), 107 Stat. 1536, 1537-38 (1993) (codified at 18 U.S.C. @ 922(s)(2) (1994)). Plaintiff Samuel Frank, the Sheriff of Orange County, Vermont, cross-appeals from the district court's rulings that he lacked standing to challenge the Brady Act on Fifth Amendment grounds and that the background check provision is severable from the remainder of the Act.

Sheriff Frank does not argue that Congress lacks the power to regulate transactions involving handguns. Apart from federalism concerns, the commerce power of the United States is almost certainly broad enough to support such regulation. See United States v. Lopez, 131 L. Ed. 2d 626,

115 S. Ct. 1624, 1630 (1995) ("The proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252, 258, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964) (although final version of Civil Rights Act carried no congressional findings, burden on interstate commerce permitted prohibition of racial discrimination by motels); H.R. Rep. No. 90-1577, 90th Cong., 2d Sess. (1968), reprinted [*4] in 1968 U.S.C.C.A.N. 4410, 4411 ("The principal purpose of [the Gun Control Act] is to strengthen Federal controls over interstate and foreign commerce in firearms . . . ."); H.R. Rep. No. 103-344, 103d Cong., 1st Sess. 9-10 (1993), reprinted in 1993 U.S.C.C.A.N. 1984, 1986-87 (background checks intended to effectuate prohibitions contained in Gun Control Act).

The issue on this appeal, then, does not involve Congress' ordinary power to regulate under the Commerce Clause; the issue is whether the regulatory means chosen under the Brady Act are valid or intrude impermissibly upon state sovereignty. At the front where the enumerated powers granted to Congress under the Constitution clash with those powers reserved to the States by the Tenth Amendment, there is no certain line of demarcation. But whatever line there is, it is one to which we should hold strongly. The powers reserved to the States must not be, like the Maginot line, easily outflanked by the powers of the national government. In our view, the background check provisions of the Brady Act do not cross that line and trespass on those rights reserved by the Tenth Amendment.

FACTS

A. The Brady Act

Congress [*5] enacted the Brady Act in 1993 to address the national epidemic of handgun violence and death. See H.R. Rep. No. 103-344, 103d Cong., 1st Sess. 8 (1993), reprinted in 1993 U.S.C.C.A.N. 1984, 1985. The Act amends title I of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. @@ 921-930 (1994)), which regulates firearms dealers and prohibits the transfer of firearms to specific categories of persons ranging from felons and "fugitives from justice" to certain non-citizens. See 18 U.S.C. @ 922(g). To put teeth into these prohibitions by identifying unlawful gun transactions before they occur, the Act imposes a background check system.

The Act operates in two phases. First, it requires the U.S. Department of Justice to develop a national instant background check system for firearms transfers, which is to be operational by the year 1999. See @ 103(b), 107 Stat. at 1541; 18 U.S.C. @ 922(t) (permanent provision). This instant check system requires no waiting period. See @ 922(t)(1). Second, for gun purchases occurring before the national system is active, the Act contains an interim provision that imposes a five-day waiting [*6] period during which a background check is to take place. @ 922(s)(2). This provision does not apply in States that require pre-purchase background checks, see @ 922(s)(1)(D), or permits and pre-permit background checks for handgun purchases, see @ 922(s)(1)(C).

It is this interim background check provision that is the subject of the instant litigation. Such checks are to be conducted by the "chief law enforcement officer" (CLEO) of the proposed purchaser's place of residence, see @ 922(s)(2), which the Act defines as "the chief of police, the sheriff, or

an equivalent officer or the designee of any such individual." @ 922(s)(8). Before transferring a handgun, a licensed firearms dealer must obtain a statement from the purchaser (transferee). @ 922(s)(1)(A)(i)(I). In practice, this means that a person seeking to buy a handgun must fill out a form prepared by the Bureau of Alcohol, Tobacco and Firearms (Bureau). See 27 C.F.R. @ 178.102(a)(1) (1995) (conditioning handgun transfers on receipt by the licensee of a "statement of intent to obtain a handgun on Form 5300.35"). The dealer then transmits the form to the CLEO of the transferee's place of residence. @ 922(s)(1)(A)(i)(III); [*7] 27 C.F.R. @ 178.102(a)(3).

After a CLEO receives a copy of such a statement from a dealer, that official "shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." @ 922(s)(2). Two additional requirements are imposed on CLEOs in connection with these interim background checks. If the CLEO determines, on the basis of the background check, that a proposed transfer would be lawful, he or she must destroy the transferee's statement and related records. @ 922(s)(6)(B)(i). If, however, the CLEO determines that a proposed transfer would be illegal, the CLEO must give written reasons if the would-be gun buyer so requests. See @ 922(s)(6)(C).

Criminal penalties are provided: "Whoever knowingly violates [the Brady Act interim or permanent provisions] shall be fined . . ., imprisoned for not more than 1 year, or both." 18 U.S.C. @ 924(a)(5). The applicability of these penalties to CLEOs is in dispute in this litigation. However,

the record does not suggest that Sheriff [*8] Frank or any other potential CLEO has been prosecuted or threatened with prosecution under this subsection. In a March 16, 1994 memorandum to the Attorney General, the Office of Legal Counsel took the position that for a variety of reasons prosecuting and applying the penalty provision to CLEOs would be impractical and inconsistent with the statute's language and aim.

B. Brady's Implementation in Orange County

The Bureau, which by delegation of the Secretary of the Treasury is responsible for the implementation of the Gun Control Act and the 1993 amendments, see 18 U.S.C. @ 926 (1994), interprets the term "CLEO" as broad enough to encompass more than one law enforcement officer within any given geographical area. On January 21, 1994, before the effective date of the Brady Act, it sent an "Open Letter to State and Local Law Enforcement Officials" (Open Letter) explaining the requirements of the Act and suggesting that state and local officials in each locality work together to decide which agency would perform the CLEO functions. The Bureau now maintains a list of the responsible CLEOs in the jurisdictions within States covered by the five-day interim requirement of the [*9] Act and publishes changes in CLEO status in the Federal Register. See, e.g., 59 Fed. Reg. 37,532 (1994).

On January 1, 1994 Sheriff Frank, Commissioner A. James Walton, Jr. of the Vermont Department of Public Safety, and numerous other interested law enforcement officials attended a meeting at Norwich University in Northfield, Vermont organized by the Bureau and the Vermont Department of Public Safety to discuss the Act's implementation. At the

meeting, Commissioner Walton told local officials that the State would be willing to appoint an officer of the State Police to discharge the CLEO duties in any jurisdictions in which local officials declined to do so. Sheriff Frank then indicated that he would perform that function in Orange County.

The Bureau subsequently placed the sheriff on its list as the CLEO for Orange County and notified licensed firearms dealers in Vermont of its action. Initially, the sheriff's office performed the background check duties. After Sheriff Frank instituted the present suit, the state safety commissioner asked the Bureau to change the CLEO designation; the Bureau notified the sheriff on June 29, 1994 that it would now treat Lieutenant George [*10] C. Contois of the Vermont State Police as the CLEO for Orange County because the sheriff's position in the litigation indicated his unwillingness to perform that function.

C. The Lawsuit

On May 10, 1994 Sheriff Frank commenced the instant action in the District of Vermont against the United States. The complaint sought a declaration that the background check requirement is unconstitutional and requested a preliminary and permanent injunction against its enforcement. The papers filed alleged that the mandated background check violates the Tenth Amendment by impairing the performance of the sheriff's duties under state law, that it violates the Fifth Amendment because it is excessively vague, and that this provision is not severable and the entire interim portion of the Brady Act is therefore invalid. In response, the government contended plaintiff lacked standing to litigate either of his claims because he

voluntarily assumed the CLEO duties and because the government's interpretation of the Act's criminal provisions as inapplicable to CLEOs eliminated any threat of prosecution. The government also urged that the background check requirement was a valid exercise of Congress' [*11] power and that it was, in any event, severable from the other interim provisions.

Following a hearing, the district court ruled that Sheriff Frank has standing to assert the Tenth Amendment because officers of the Vermont State Police are not CLEOs under 18 U.S.C. @ 922(s)(8). See Frank v. United States, 860 F. Supp. 1030, 1037-39 (D. Vt. 1994). It ruled further that the background check provision is barred by the Tenth Amendment, but that the provision is severable from the remainder of the Brady Act. Id. at 1043-44. The trial court held, in addition, that Sheriff Frank lacks standing to challenge the Act on due process grounds. Id. at 1036. From this judgment the United States appeals, and Sheriff Frank cross-appeals.

ANALYSIS

I Standing

We must first decide whether Sheriff Frank has standing to challenge the Brady Act on Tenth Amendment grounds. Article III of the Constitution imposes three requirements for standing: plaintiff must have suffered an injury in fact, concrete and particularized as to plaintiff, actual and not hypothetical; the injury must be fairly traceable to defendant's challenged conduct and not caused by the

independent action of a third [*12] party; and the injury must likely, not possibly, be redressable by a favorable decision in the litigation. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984); Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58 (2d Cir. 1994). These constitutional requirements stem from separation of powers principles. See Defenders of Wildlife, 504 U.S. at 559-60. Standing also includes prudential limits, see, e.g., Golden Hill, 39 F.3d at 58, which not being here implicated are not addressed.

A. Statutory Argument

The issue of standing in the case at hand is, in the first instance, one of statutory construction. The question is whether the term "chief law enforcement officer" used in @ 922(s)(2) of the Act includes state as well as local officers. If so, the government points out, Sheriff Frank's assumption of the CLEO duties in Orange County was voluntary because the Vermont State Police had said it would discharge the duties in any jurisdictions in which local law enforcement agencies did not want to act. If the government is correct and Sheriff Frank's injury is self-inflicted, he lacks [*13] standing for Article III purposes. See Diamond v. Charles, 476 U.S. 54, 70, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986) (assessment for attorney's fees resulted from litigant's intervention and could not fairly be traced to statute whose constitutionality was at issue); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976) (injury at the hands of a non-party is insufficient); Petro-Chem Processing, Inc. v. EPA, 275 U.S. App. D.C. 232, 866 F.2d 433, 438 (D.C. Cir.) (potential

liability incurred voluntarily cannot fairly be traced to challenged conduct of defendant), cert. denied, 490 U.S. 1106 (1989).

Plaintiff insists the Act does not permit state officials to be CLEOs. Had Congress meant CLEO to include only local law enforcement officials, then the state safety commissioner's offer to perform the background checks would have had no effect on Sheriff Frank's duties as the CLEO of Orange County and plaintiff's statutory argument would carry the day. We are unable to adopt plaintiff's restrictive understanding of CLEO.

To begin, by defining CLEO as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual," 18 U.S.C. @ 922(s)(8), Congress did not expressly exclude state officials [*14] from performing background checks. Although, as plaintiff points out, Congress knew how to say "State" when it wanted to, see, e.g., @ 922(t)(6) (limiting liability for employees "of the Federal Government or of any State or local government"), it also knew how to say "local" when that is what it meant, see id., and it said neither in the definition of CLEO. Instead, it used the more adjustable term "equivalent officer."

Further, the structure of the Brady Act does not support an interpretation of CLEO restricted to local officers. A broader construction of the term is consistent with the flexible background check responsibility: CLEOs are required only to "make a reasonable effort to ascertain" the legality of a proposed transfer. @ 922(s)(2). To make the waiting period and background check effective as an interim measure, the words "or equivalent officer" were used by Congress to reflect the reality that background checks can be performed

best in different locales by different agencies. The legislature explicitly recognized the vast differences between different local areas by exempting altogether certain sparsely-populated areas from the requirement, see @ 922(s)(1)(F); [*15] it also accomplished this by using the inclusive term "equivalent officer" within the definition of CLEO. Hence, the Vermont State Police, whose powers over criminal matters are identical to sheriffs' under Vermont law, see Vt. Stat. Ann. tit. 20, @ 1914 (1987), fall within the definition of CLEO.

Moreover, to the extent the statute is ambiguous, we defer to the Bureau's reasonable interpretation of the term because it is the agency charged with administering the Gun Control Act and the Brady Act. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1983) (where statute silent or ambiguous, the question is whether the agency's resolution "is based on permissible construction of the statute"). Plaintiff asserts that deference is not warranted because "equivalent officer" was not included in the definition of CLEO to resolve conflicting policies. See Chevron, 467 U.S. at 844. Although policy questions are quite clearly implicated, we believe the essential question is not whether there are conflicting policies, but "whether Congress has directly spoken to the precise question at issue." Id. at 842.

It has not so spoken. Neither the Act's [*16] text nor its legislative history contains a definition of "equivalent officer," and the Bureau's Open Letter and its compilation of the CLEOs in various jurisdictions, see, e.g., 59 Fed. Reg. 37,532 (1994), make plain that it views CLEO as including state officials. Given the language and purpose of the Act, the Bureau's construction is certainly a permissible one.

Consequently, plaintiff's standing may not rest on the scope of the term CLEO.

B. Administrative Burdens

Reading CLEO to include state officials along with local officers does not end the standing inquiry. Although the Act does not require plaintiff to serve as the CLEO of Orange County, we think it inflicts sufficient injury to give him standing. Because the Act envisions that more than one official can qualify as CLEO in a given jurisdiction and provides no formal mechanism for choosing among the candidates, it therefore mandates at a minimum that the relevant state and local law enforcement officials reach an agreement as to which agency will serve as CLEO. See Roy v. Kentucky State Police, 881 F. Supp. 290, 293 (W.D. Ky. 1995) ("Congress envisioned that law enforcement agencies with an interest [*17] in and the ability to perform the Brady Act requirements would meet and agree upon the CLEO in each geographic area."). Indeed, the Bureau's Open Letter so concluded. It suggested that state and local officials work together to determine which agency would perform the CLEO functions in each jurisdiction, which is why the Bureau brought state and local law enforcement officials together not only in Vermont, but throughout the country.

It is this administrative burden added to the sheriff's regular workload that permits plaintiff to maintain his Tenth Amendment challenge. Interference with the functions of a local unit of government is an injury that may give a litigant standing. Friends of the Earth v. Carey, 552 F.2d 25, 33 (2d Cir.), cert. denied, 434 U.S. 902, 54 L. Ed. 2d 188, 98 S. Ct. 296 (1977). It is familiar law that injury in the context of standing is not limited to economic harm, see United States

v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973), although a plaintiff seeking review must be among the injured. See Sierra Club v. Morton, 405 U.S. 727, 734-40, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) (not enough to allege government changes in national park would destroy scenery and wildlife; to [*18] have standing plaintiff must allege that its members use the park and are directly affected).

By making Sheriff Frank responsible -- even though only concurrently with others -- for ensuring that some qualified agency performs the background checks in Orange County, the Act imposes administrative burdens beyond simply reaching an agreement. To decide which of the potential CLEOs will perform the tasks required by the Brady Act, plaintiff and his counterparts must as a practical matter undertake an analysis of their own internal procedures and capabilities, consider the impact of background checks on their budgets and on delivery of customary sheriff's services, and work together to determine who may best conduct the interim background checks. This imposition compels action by state and local officials in a way that is alleged to violate state sovereignty.

Additionally, the burden does not end with an initial agreement on performing the checks. Plaintiff is excused from the CLEO duties only for so long as the State Police are willing to discharge them. And that willingness, for budgetary, political, and logistical reasons, is always subject to change. The CLEO duties therefore remain [*19] a factor in the way the sheriff's office structures its operations. These several burdens, we believe, impact sufficiently upon Sheriff Frank to give him standing to maintain the present action.

Our concurring colleague writes that the imposition of the CLEO duties on Sheriff Frank is sheer speculation and that the administrative burdens are insufficient to support standing. First, although the possibility that the state will withdraw its pledge to supply personnel is not certain to occur, that possibility imposes a present burden on the sheriff that is by no means speculative. The sheriff's office must plan for the contingency even if it never materializes. Moreover, the Act imposes another present burden on him even if the state continues to volunteer: he must reach an initial agreement and continue to agree with the state and other potential CLEOs.

Second, although the administrative burdens may appear to be a slender reed upon which to base standing, they are sufficient for constitutional purposes. The burden of an allegedly unconstitutional statute need not be crippling before it may be challenged in court; plaintiff only need allege "such a personal stake in the outcome of [*20] the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). While the harm must be "perceptible," Defenders of Wildlife, 504 U.S. at 566, it need not be monumental. In the present case, the continuing burden on Sheriff Frank meets this requirement and has led to this sharply contested lawsuit. Therefore, the injury-in-fact requirement has been met.

The government's argument that Sheriff Frank lacks standing because he voluntarily assumed the CLEO duties is based on the willingness of another state-created entity, with

the approval of the Bureau, to perform the functions in his stead. We do not adopt this reasoning because to do so would grant to the government the power unilaterally to prevent the resolution of a controversy by designating and replacing CLEOs and thereby destroying standing. Ten days after the instant action was commenced, Commissioner Walton notified Sheriff Frank that the lawsuit indicated his desire to discontinue the CLEO functions and that the Bureau was being asked to designate [*21] the State Police as CLEO. The Bureau assented to the change. A State may not consent to a Tenth Amendment violation, New York v. United States, 505 U.S. 144, 182, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992); nor should litigants be allowed to strategically prevent controversies from being resolved, cf. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 71 L. Ed. 2d 152, 102 S. Ct. 1070 (1982) (a case is not moot where a litigant abandons a challenged practice); United States v. W.T. Grant Co., 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case"). Under the present circumstances, to accept the contention that the sheriff now lacks standing would not serve the purpose of identifying and resolving those disputes most appropriately heard and decided by the federal courts, see Defenders of Wildlife, 504 U.S. at 560; Whitmore v. Arkansas, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990).

Moreover, we have held that a local unit of government has standing to challenge a federal requirement on Tenth Amendment grounds despite the failure of the State -- the creator of the local entity -- to join in the challenge. Friends of the Earth, 552 F.2d at 33. The [*22] instant case raises the same concerns -- the county sheriff should not be

precluded from challenging the statute merely because the State has supported the Brady Act and has pledged personnel to carry out the background checks. The burden imposed on Sheriff Frank by the Brady Act is sufficiently concrete, actual, and particularized to constitute injury for constitutional purposes. The injury is directly caused by the challenged statutory provision, and would be eliminated were the litigation resolved in Sheriff Frank's favor.

As our concurring colleague points out, the burden imposed on New York City in Friends of the Earth was much heavier than the one imposed on Sheriff Frank. Although the burden of complying with an automobile pollution control plan is concededly more severe than the administrative requirements mandated by the Brady Act, Friends of the Earth, like the present case, involved a Tenth Amendment challenge of a federal requirement by a local governmental unit; the State in Friends of the Earth supported the federal mandate and it was argued that the local government therefore had no standing. Here, the State of Vermont has supported the Brady Act and has [*23] agreed to perform the interim background checks in certain jurisdictions. Therefore, the principle that was dispositive in Friends of the Earth -- that a state's failure to oppose a federal requirement does not prevent a political subdivision from bringing a federalism challenge -applies with equal force to the present case. Plaintiff therefore has standing to challenge the Act on Tenth Amendment grounds.

II Tenth Amendment

A. Federalism Principles and the Boundaries of Congressional Power

Having resolved the threshold question of standing, we pass now to a discussion of the merits. The Tenth Amendment to the United States Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Because the Tenth Amendment simply states that all is kept that has not been surrendered, see United States v. Darby, 312 U.S. 100, 124, 85 L. Ed. 609, 61 S. Ct. 451 (1941), the reach of the federal government's power vis-a-vis the States may be analyzed as a question of whether Congress has exceeded the bounds of its delegated powers, or whether it has impermissibly trenched upon state sovereignty. [*24] As observed by the Framers, that power surrendered by the people is divided between two governments that will control each other, giving rise to a "double security" protecting the rights of the people. The Federalist No. 51, at 263-64 (James Madison) (J.M. Dent & Sons Ltd., 1961). The purpose of the division is to protect the liberty of individual citizens from an excessive concentration of power in a central government. See United States v. Lopez, 131 L. Ed. 2d 626, 115 S. Ct. 1624, 1626 (1995) (The mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." (internal quotations omitted)); Gregory v. Ashcroft, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (as the separation of the branches of national government keeps each in check, so a "balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

To help navigate safely through the murky waters of Tenth Amendment doctrine, it is necessary to dispel the notion that the federal government may never compel action by state officials. This was stated to be the law over a century ago in

Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107, 16 L. Ed. 717 (1861): [*25] "The Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." Today, a view that the national and state governments are coequal sovereigns in all circumstances does not fairly represent the state of the law. See Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 761, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) (FERC).

There are occasions when the federal government may impose legal duties on state officers. For example, Congress may require state regulatory authorities to implement federally-promulgated rules requiring the adjudication of disputes arising under a federal statute. See FERC, 456 U.S. at 759-60. Instead of preempting an area of state regulatory activity, Congress may require state authorities to consider the enactment of federally-proposed standards, id. at 764. Also, the national government may insist that States treat their workers according to federally-imposed wage and overtime standards. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555-56, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (upholding minimum wage and overtime requirements); Fry v. United States, 421 U.S. 542, 548, 44 L. Ed. 2d 363, 95 S. Ct. 1792 (1975) (upholding wage stabilization [*26] measures).

Certain kinds of federal action are by their very nature so intrusive as to violate the Tenth Amendment regardless of how light a burden is imposed on state officials. Coercive commandeering of the States' legislative processes that effectively compels the States to adopt a federal regulatory program is one example. See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 288, 69

L. Ed. 2d 1, 101 S. Ct. 2352 (1981). In New York v. United States, 505 U.S. 144, 177, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), the Supreme Court held that the take title provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985, which gave States the choice between either taking title to and assuming legal responsibility for waste generated within their borders, or regulating such waste according to Congress' instructions, exceeded Congress' power under the Constitution. It was the coercive nature of the take title provision that violated the constitutional plan, that is, Congress has no power to make the States require or prohibit certain acts, even though Congress itself may pass laws requiring or prohibiting those same acts. Id. at 166. The take title provision also violated the principle that officials, both [*27] state and federal, must remain accountable to their constituents. Id. at 168.

Therefore, there is a clear prohibition against directing States to legislate or to regulate because the structural nature of the intrusion plainly strikes at the heart of state sovereignty and violates the Constitution's careful allocation of power between the federal and state governments. Apart from this specific prohibition, the severity of the burden placed on States is the touchstone for determining whether national legislation is so onerous as to threaten the effectiveness of the States in our federal system. In the case of a law of general application, for instance, state sovereignty will ordinarily be sufficiently protected by the States' participation and influence in the national political process, see Garcia, 469 U.S. at 554, so as not to warrant judicial intervention to safeguard their interests. Directives aimed solely at States have similarly been upheld if they do not place "any particularly onerous burden on the State." FERC, 456 U.S. at 768.

In determining whether Congress has transgressed either the structural or the quantitative limits, the nature of the federal requirement [*28] imposed on the States rather than the subject matter of the regulation must be examined. Rejecting, as impracticable, the four-part test for immunity from federal regulation set forth in National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), the Supreme Court in Garcia, 469 U.S. at 548, focused on preserving the role of the States in our federal system. Thus, South Carolina v. Baker, 485 U.S. 505, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988), upheld a federal statute that effectively required States to issue registered bonds, as opposed to bearer bonds, if they chose to issue bonds at all. South Carolina confirmed that the limits imposed by the Tenth Amendment are "structural, not substantive." That is, States must find protection from Congress' intrusions via the national political process, not by having courts define state activities that may not be regulated. Id. at 512. New York reaffirmed that Tenth Amendment analysis should focus on the appropriate roles of the States and the federal government rather than the subject matter of the regulation. See 505 U.S. at 160-61.

B. Constitutionality of the Brady Act

With these principles in mind, we now address the constitutionality [*29] of the provision requiring CLEOs to "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun] would be in violation of the law." See 18 U.S.C. @ 922(s)(2). We do not think the background check requirement of the Brady Act interim provisions imposes a structural burden inconsistent with the plan established by the Constitution; nor does it impose an

onerous quantitative burden on state or local officials. We address these issues in turn.

1. Brady Act Consistent with Structural Limits of Tenth Amendment

We turn first to the formal limits imposed by the federal structure of our Constitution. Sheriff Frank, relying primarily on New York, urges that the interim background check requirement is unconstitutional regardless of the quantitative degree of the burden imposed. The Tenth Amendment does impose structural restrictions on congressional action. But unlike the statute at issue in New York, which attempted to foist the responsibility for addressing the problems of low-level radioactive waste upon the States, the Brady Act is consistent with the constitutional scheme.

As already noted, we rejected at the outset plaintiff's contention [*30] that Congress may never compel state officials to perform duties and may only seek to guide States' behavior by attaching conditions to federal funds, threatening preemption, or passing generally-applicable legislation. New York did not purport to revert to the 19th-century rule that the federal government may never impose obligations on state officers. Instead, that case involved a "unique" statute that in its take title provision coerced state governments into implementing federal law and therefore violated the Tenth Amendment. 505 U.S. at 177. The Supreme Court reasoned that the take title provision and its alternative pressed state governments into federal regulatory service by offering States the choice between regulating according to Congress' instructions or themselves assuming liability for the waste. Id. at 175. The offending take title provision violated Hodel's edict that the national government cannot mobilize "the

legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 452 U.S. at 288.

The Brady Act does not direct the States to enact legislation or to promulgate regulations. See Mack v. United [*31] States, 66 F.3d 1025, 1031 (9th Cir. 1995). Rather, to the extent that it implicates the States' legislative processes at all, it merely allows States to enact a background check or permit system for handgun purchases as an alternative to federally-required checks by CLEOs, see 18 U.S.C. @ 922(s)(1)(C)-(D). But, such a state enactment is not mandated or even significantly encouraged.

Sheriff Frank, further relying on New York, urges that the Brady Act contravenes the Tenth Amendment because Congress has "the power to regulate individuals, not States," New York, 505 U.S. at 166, and that "the Federal Government may not compel the States to enact or administer a federal regulatory program," id. at 188. The background check requirement of the Act does not transgress New York's holding. Unlike the statutory scheme established in the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to encourage States to reach their own solutions, the Brady Act is an exercise of Congress's power to regulate individuals. The thrust of the Act is to improve the effectiveness of the laws governing handgun transfers between individual citizens. To achieve this purpose, [*32] the Act requires registered dealers and potential transferees to supply information to law enforcement personnel when a transaction is proposed, and it prohibits the consummation of potential transactions found to be illegal. That the Brady Act enlists state officials during the interim period, pending the implementation of a national system for instant background

checks, does not change the Act's basic character. Because the Act neither requires States to enact regulations by requiring them to fashion their own solutions, nor abdicates political responsibility in the handgun control field, it is distinguishable from the statutory provision found offensive in New York.

Congress has authority to subject state governments to generally applicable laws that govern the conduct of private parties. Such laws are different from attempts by the national government to direct or otherwise motivate the States to regulate in a particular field in a particular way, that is to say, it is permissible for Congress to require private citizens to act in a certain manner and for the States to help administer such a federal law, but Congress cannot require the States to pass laws requiring their citizens [*33] to act in a certain manner.

Congress is, according to New York, barred under the Tenth Amendment from compelling state legislatures to enact legislation because the federal government may not commandeer the basic decisionmaking processes of state government. This view is reinforced by the Supreme Court's repeated reference to Hodel, which upheld provisions of the Surface Mining Control and Reclamation Act of 1977 because that statute did not compel the States to enact and enforce a federal regulatory program and thereby take over the States' legislative processes. Hodel, 452 U.S. at 288, quoted in New York, 505 U.S. at 161, 162, 170, 176. The offending provision in New York -- because it required States to enact their own regulatory solution -- was the sort of unconstitutional legislation alluded to in Hodel.

Moreover, the Framers contemplated and approved the

administration by state officials of federal laws applicable to individuals. Thus, Madison said collection of tax revenue for national purposes "will generally be made by the officers . . . appointed by the several States." The Federalist No. 45, at 237 (James Madison) (J.M. Dent & Sons Ltd., 1961). [*34] Hamilton agreed: "The national legislature can make use of the system of each State within that State. The method of laying and collecting . . . taxes in each State can, in all its parts, be adopted and employed by the federal government." The Federalist No. 36, at 172 (Alexander Hamilton) (emphasis in original). Mandates to local officials to enforce federal as well as state laws -- as in the interim provisions of the Brady Act -- do not encroach on state sovereignty in any appreciable manner.

The absence of compelled regulation helps illuminate the central reason that New York is not controlling: the roles of the federal government and the States under the Brady Act are consistent with the values underlying federalism. "Where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." New York, 505 U.S. at 168. Under an arrangement like that in New York, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decisions." Id. at 169.

The Brady Act has no [*35] such effect on accountability. First, the Act itself is a national, comprehensive approach to identifying potential illicit handgun transactions. Because it requires no additional enactments by state governments, it poses little risk of shifting the blame (or glory) for its provisions to local

officials. Additionally, because the administration of the interim provisions is vested in a federal agency -- the Bureau of Alcohol, Tobacco and Firearms -- there is little danger of confusion. For example, the Act instructs potential transferees to fill out a Form 5300.35, clearly identified as a federal form. See 27 C.F.R. @ 178.102(a)(1) (1995).

Second, political accountability would be jeopardized were local officials able to invoke the Tenth Amendment to defeat even the lightest and most insignificant federal mandate. Just as Congress in New York attempted to shift responsibility to state officials, federal officials could shift the blame for inaction by attributing persistent national problems, such as handgun violence, to the intransigence of local officials. Even more problematic is the possibility that federal officials could consistently surrender responsibility for national [*36] problems by invoking abstract notions of "federalism," which would result in dissipation, as opposed to a mere shifting, of political responsibility. Thus, the accountability concerns discussed in New York support the validity of the Brady Act.

Today's ruling serves the purposes of federalism in another way. Returning to the 19th-century prohibition of any direct mandate to state officers would lead Congress, when it acts, to do so exclusively through federal instrumentalities. Rather than promoting the "constitutionally mandated division of authority" intended by the framers to protect individual citizens' liberties, Lopez, 115 S. Ct. at 1626, the perverse result would be a further concentration of authority in the federal government. Sheriff Frank has not asserted in this litigation that Congress could not, by exercising its commerce power, bypass local governments and employ federal agents to check on citizens who wish to purchase

firearms. Such action illustrates how direct federal intervention could follow from the adoption of a simple "no compulsion" rule. Federalism is too crucial, too central to our system of government to be trivialized by a rule that would make [*37] any co-optation of any state official into a violation of the Constitution. The effect of such a rigid rule would be the multiplication of direct federal bureaucratic intervention and, hence, in practice, a greater reduction in effective federalism.

In addition to being qualitatively different from arrangements like the one invalidated in New York, the duties imposed on CLEOs are more like those that have been upheld in prior cases. Congress can require state courts to entertain a federal claim despite a contrary state rule or policy. See Testa v. Katt, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947). Although a state court may refuse to do so if it has a "valid excuse," see Douglas v. New York, New Haven & Hartford R.R. Co., 279 U.S. 377, 388, 73 L. Ed. 747, 49 S. Ct. 355 (1929), "an excuse that is inconsistent with or violates federal law is not a valid excuse." Howlett v. Rose, 496 U.S. 356, 371, 110 L. Ed. 2d 332, 110 S. Ct. 2430 (1990). This principle does not apply only to state courts; Congress also may enlist state regulators to vindicate federal rights. See FERC, 456 U.S. at 760 & 763 n.27 ("It is difficult to perceive any fundamental distinction between the state legislature's power to establish limits on the jurisdiction of the state courts, [*38] and its prerogative to set ratemaking criteria for use by quasi-legislative utilities commissions.").

CLEOs' duties under the Brady Act are not qualitatively different from the congressionally-imposed functions upheld in such cases as Testa and FERC. When a Form 5300.35 is forwarded by a transferor, a CLEO is required to consult

relevant records and issue a determination as to whether the transaction can be consummated. If the decision is favorable, the five-day waiting period is truncated and the weapon may be transferred. See 18 U.S.C. @ 922(s)(1)(A)(ii)(II). The same result obtains if the five-day period has elapsed without notice from the CLEO. See @ 922(s)(1)(A)(ii)(I). If the decision is not favorable, then the transaction has been identified as illegal and may not take place. See @ 922(s)(1). In the operation of the Brady Act, as in the circumstances of FERC and Testa, the federal government has taken responsibility for determining the applicable standards, and state officials are being asked to apply those standards to a particular situation. Although plaintiff attempts to dismiss FERC and Testa as merely addressing "adjudicatory" bodies, [*39] in so doing he fails to acknowledge the striking similarity between the obligations imposed in those cases and those imposed on CLEOs. The applicability of the Testa principle depends upon the role performed by the state officer, not the governmental branch involved. See FERC, 456 U.S. at 762 n.27. Thus, the proffered distinction is irrelevant. Testa was distinguished in New York on the grounds that the legislation in question in the latter case did not regulate individuals and required States to engage in legislation. 505 U.S. at 178-79. Unlike a statute that commands state legislatures to legislate, the Brady Act simply requires CLEOs to apply federal law in the regulation of individuals and to perform a function similar to those validated in FERC and Testa.

In sum, after Testa, Garcia, Gregory, and New York it is now clear that Congress acts within its broad power to regulate under the Commerce Clause when its legislation neither obscures lines of political accountability nor disturbs the ordinary presumed sovereignty of the States. This

principle furthers federalism and strengthens its attendant political safeguards -- the "double security" [*40] -- in our constitutional system.

2. No Impermissibly Onerous Burden on States

Sheriff Frank contends, at least with respect to his standing argument, that the duties imposed by the Brady Act are burdensome. In an affidavit filed in support of a preliminary injunction, he stated a typical background check included a search of the National Crime Information Center that the State Police in Bradford, Vermont performed at his request. The National Crime Information Center provides criminal background information that covers the entire country. Preparing the request and transmitting it by facsimile took 15 minutes. The State Police would notify the Sheriff's office by telephone of potential legal problems with a given transfer. To obtain the National Crime Information Center's findings, he reported, a deputy had to drive 30 minutes to the State Police barracks and back. Deciphering the report often demanded additional telephone calls. In his affidavit, Sheriff Frank described a number of other sets of records that might be relevant to the legality of handgun transactions. When he testified before the district court, he indicated that a Brady check "may take us anywhere from 15 [*41] minutes to -- well, we had one up to six hours."

We do not think the described burden is so significant quantitatively that it rises to the level of a constitutional violation. Courts should avoid construing a statute in a manner that raises serious constitutional problems whenever possible, unless such otherwise acceptable construction of a statute is not plainly repugnant to Congress' aim. This is true generally, see, e.g., Edward J. DeBartolo Corp. v. Florida

Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988), and is particularly true where a federal statute might be construed to invade state sovereignty impermissibly, see Gregory v. Ashcroft, 501 U.S. 452, 469-70, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); Will v. Michigan Dep't of State Police, 491 U.S. 58, 65, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). In the context of the Brady Act, this rule tips us toward construing the background check requirement as imposing only a light burden on CLEOs. Such a reading is consistent with the tenor and language of the Act, which simply requires a "reasonable effort" and directs that the background check include searching state and local records only if they are "available." See 18 U.S.C. @ 922(s)(2). The view that the [*42] burden is a light one accords with the Bureau's interpretation of the Act as expressed in its Open Letter, which stated the Act requires "some minimal effort to check commonly available records."

Because the relevant circumstances -- including the availability of resources, access to records, frequency of requests, and the likelihood that the CLEO will be personally acquainted with the transferee -- will vary among different localities, what is a "reasonable effort" depends upon the jurisdiction. In some extreme situations, such as where an emergency demands the immediate attention of the CLEO, a "reasonable effort" might conceivably be no action at all. The Brady Act's use of a highly subjective standard ensures that state officials are not excessively burdened. Moreover, the degree of inconvenience visited on the States is even smaller in view of the flexible definition of CLEO, discussed above, which allows agencies like Sheriff Frank's office to avoid the task by delegation or by agreement with other agencies qualifying as CLEOs.

In view of our duty to construe statutes so as to avoid raising serious constitutional problems, and the text and legislative history of the Act, we [*43] interpret the Act as imposing a minimal, as opposed to an onerous, burden on CLEOs. If a CLEO engages in unreasonably burdensome activities to determine the legality of proposed handgun transfers, the CLEO cannot claim that the statute demands it. Congress has tailored the Brady Act to require only a minimal effort, one no more oppressive than the requirements upheld in FERC. Such effort does not constitute a hardship of constitutional proportions.

Similarly, the two other relevant requirements of the Brady Act -- destruction of records and notification of certain transferees of the reasons for denying their applications -- also do not constitute impermissibly burdensome directives. These requirements are dwarfed by the administrative hearings and judicial actions mandated by PURPA. From the standpoint of the required time, the effect on resource allocation, and the level of difficulty, these duties are relatively insignificant. Indeed, Sheriff Frank has not represented to us that these post-search responsibilities are onerous. Other courts have concluded they are not. See Printz v. United States, 854 F. Supp. 1503, 1517 (D. Mont. 1994) (record destruction requirement is [*44] de minimis), rev'd on other grounds sub nom. Mack, 66 F.3d at 1034; McGee v. United States, 863 F. Supp. 321, 327 (S.D. Miss. 1994) (same).

In addition, the very circumstances that cast doubt on whether Sheriff Frank had standing -- the willingness of other state officials to perform the CLEO functions -- tend to show that the Brady Act is not a significant imposition on

state or local officers. If the tasks required by the Act were impracticable or unduly onerous, the State Police might not have been so willing to relieve local law enforcement officials of the obligation. Nor might Sheriff Frank have been so willing to volunteer initially to perform the CLEO duties. Usually, of course, the issue of standing is entirely separate from the question of the merits. But in this case, the same facts that lead the concurring judge to find no standing seem to us -- while indicating the presence of some burden -- to show the burden imposed on Sheriff Frank and others in his position to be sufficiently small that our conclusion on the merits follows almost necessarily.

In sum, the obligations imposed on CLEOs by the Brady Act do not entrench on those powers reserved to the States [*45] by the Tenth Amendment. The Brady Act does not establish a structurally defective scheme like the one struck down in New York. The effort required is minimal, and the Act is therefore not unconstitutional by virtue of the magnitude of the burden. Finally, it is consistent with the principles undergirding our federal system, and with past decisions permitting federal impositions on States. As a consequence, we declare the challenged provisions of the Brady Act constitutional.

III Due Process

We turn now to the remaining issues and dispose of them as briefly as possible. Plaintiff urged the district court, in support of his motion for a preliminary injunction, to rule that the Act's background check requirement is unconstitutionally vague. This argument depended on the applicability of the Brady Act's criminal penalty provision to CLEOs. See Frank, 860 F. Supp. at 1034. The district court

held instead that Sheriff Frank lacked standing with respect to this Fifth Amendment claim because the Department of Justice's Office of Legal Counsel stated that the penalty provisions do not apply to CLEOs. The trial court ruled that Sheriff Frank was in no danger of being prosecuted [*46] and had therefore failed to demonstrate an injury. See id. at 1036.

On appeal, plaintiff again challenges @ 922(s)(2) as unconstitutionally vague. He does this by identifying vagueness as an issue and incorporating arguments made in a memorandum in support of his motion for a preliminary injunction. No other reference to this issue or the Brady Act's criminal penalty provision is found in plaintiff's main brief, though he tersely contends in his reply brief that the "reasonable effort" requirement of @ 922(s)(2) is vague because it requires subjective interpretation by CLEOs.

A. Justiciability

The Fifth Amendment question does not present a justiciable controversy. Our analysis is substantially similar to that of the district court. Ripeness, standing, and related doctrines "relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." Allen v. Wright, 468 U.S. 737, 750, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984) (quoting Vander Jagt v. O'Neill, 226 U.S. App. D.C. 14, 699 F.2d 1166, 1179 (D.C. Cir. [*47] 1983) (Bork, J., concurring), cert. denied, 464 U.S. 823, 78 L. Ed. 2d 98, 104 S. Ct. 91 (1983)).

Our sensitivity to these concerns is particularly acute when a litigant invokes the power of judicial review, a power at once justified and limited by our obligation to decide cases. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). As a result, a litigant challenging the constitutionality of a statute must be subject to a "credible threat of prosecution," although actual charges need not have been filed. See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979). Further, in analyzing ripeness, we must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967).

It is inappropriate for us to address cross-appellant's vagueness claim, first, because there is no "credible threat" of criminal charges. The government, earlier in the litigation, relied on an Office of Legal Counsel memorandum concluding that CLEOs are not subject to criminal liability under the Brady Act as evidence of a formal position on the matter. Plaintiff asserts that since the memorandum [*48] was not issued by the Attorney General or formally published, it therefore represents but an informal opinion.

Even assuming that, there still remains no substantial threat of prosecution. The record does not reflect that any CLEO has been prosecuted or threatened with prosecution under the Brady Act. In addition, the Office of Legal Counsel's memorandum, however informal, has been proffered on numerous occasions as the government's position, suggesting that criminal charges against CLEOs are exceedingly unlikely. That memorandum cites a variety of compelling reasons that such prosecutions would be futile, further

supporting the proposition that charges are not imminent. In light of this, plaintiff cannot be said to have a "realistic fear of prosecution." Poe v. Ullman, 367 U.S. 497, 508, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961). Plaintiff's failure to preserve the issue for appellate review, explained below, lends support to this conclusion.

Sheriff Frank also declared, in his reply brief, that further delay would serve no purpose because the vagueness issue is primarily one of law, and that the question should be settled for the sake of the many officials who may qualify as CLEOs. We disagree. Although additional [*49] facts may not be necessary, plaintiff's failure to advance a substantive legal argument leads us to believe the issue unfit for decision now. See Abbott Laboratories, 387 U.S. at 149. Finally, declining to reach the issue does not work a hardship on either party to this suit. The vagueness question is therefore not justiciable.

B. Failure to Raise the Question on Appeal

Apart from ripeness concerns, we would not decide the vagueness issue because it was not adequately raised by plaintiff. Rule 28(a) of the Federal Rules of Appellate Procedure requires that appellants' briefs include seven specific items: (1) tables of contents and authorities, (2) statement of jurisdiction, (3) statement of issues, (4) statement of the case, (5) summary of argument, (6) argument, and (7) conclusion. The argument section must include "the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." See Fed. R. App. P. 28(a)(6). In a case in which a cross-appeal is filed, the appellee's brief must conform to the rules

governing appellants' briefs except that a statement of the case is [*50] not mandatory. See Fed. R. App. P. 28(h). With respect to his Fifth Amendment claim, plaintiff -- an appellee and cross-appellant -- did not comply with Rule 28. Although he mentioned the Fifth Amendment claim in the "issues" section and attempted to present it to us by referring to his arguments to the district court, he failed to present an argument or a "conclusion stating the precise relief sought" with respect to it. Fed. R. App. P. 28(a)(6).

In United States v. Restrepo, 986 F.2d 1462 (2d Cir.), cert. denied, 114 S. Ct. 130 (1993), appellant's argument that the district court failed to observe the maximum sentence was initially presented only in a footnote, and it was therefore inadequately raised for appellate review. Id. at 1463; Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1430 (7th Cir. 1986) (same rule). Issues not sufficiently argued are in general deemed waived and will not be considered on appeal. See United States v. Maniktala, 934 F.2d 25, 27 (2d Cir. 1991); Travitz v. Northeast Dep't ILGWU Health & Welfare Fund, 13 F.3d 704, 711 (3d Cir.), cert. denied, 128 L. Ed. 2d 888, 114 S. Ct. 2165 (1994); Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993). [*51]

Sheriff Frank concededly did more than the appellant in Restrepo: he referred to another document filed in the litigation, stated the issue, and presented a short argument in his reply brief. However, none of these additional factors leads to a different outcome. Merely incorporating an argument made to the district court does not preserve a question for appellate review. See Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 396 n.6 (4th Cir. 1994) ("Novatel[] used . . . a practice that has been consistently and roundly condemned by the Courts of

Appeals: the appellant's briefs merely adopted by reference the memoranda that it had previously filed in the district court.") (citing 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure @ 3974, at 733 & 742 n.27.7 (2d ed. Supp. 1994)), cert. denied, 131 L. Ed. 2d 135, 115 S. Ct. 1254 (1995); Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 1, 3 (1st Cir. 1983). In addition, simply stating an issue does not constitute compliance with Rule 28(a): an appellant or cross-appellant must state the issue and advance an argument. See Weaver v. Puckett, 896 F.2d 126, 128 [*52] (5th Cir.), cert. denied, 498 U.S. 966, 112 L. Ed. 2d 411, 111 S. Ct. 427 (1990); Brown v. Trustees of Boston Univ., 891 F.2d 337, 352 (1st Cir. 1989), cert. denied, 496 U.S. 937, 110 L. Ed. 2d 664, 110 S. Ct. 3217 (1990). Further, a cross-appellant generally cannot resurrect an argument omitted in its main brief by raising it for the first time in a reply brief. See Knipe v. Skinner, 999 F.2d 708, 711 (2d Cir. 1993).

We recognize that a litigant's failure to comply with Rule 28 does not automatically preclude us from considering an issue. Just as it is within our discretion to decide certain legal questions sua sponte, e.g., Lambert v. Genesee Hosp., 10 F.3d 46, 56 (2d Cir. 1993) (failure to state a claim), cert. denied, 128 L. Ed. 2d 339, 114 S. Ct. 1612 (1994), we may overlook a litigant's failure properly to present an issue on appeal in unusual circumstances, one being where manifest injustice would otherwise result. Fed. R. App. P. 2 ("In the interest of expediting decision, or for other good cause shown, a court of appeals may . . . suspend the requirements or provisions of any of these rules in a particular case"); see, e.g., United States v. Babwah, 972 F.2d 30, 35 (2d Cir. 1992); United States v. Loya, 807 F.2d 1483, 1487 [*53] (9th Cir. 1987); United States v. Anderson, 584 F.2d 849,

853 (6th Cir. 1978).

We decline in the instant case to exercise our discretion and disregard the general rule. Sheriff Frank did not attempt to explain omitting the Fifth Amendment argument from his main brief. Nor did he advance the vagueness contention at oral argument. If, as his reply brief asserts, he is threatened with prosecution under the Act's criminal provisions, it might be expected that he would mention such at oral argument. Indeed, the same factors that lead us to conclude that the Fifth Amendment question would not be justiciable even if it had been raised, as explained above, strongly suggest that plaintiff will not suffer injustice -- manifest or otherwise -- from our decision not to address the merits of his due process claim.

Moreover, because of the lack of a serious controversy on the Fifth Amendment question, we need not address whether overlooking a violation of Rule 28 would be warranted in other cases involving, for example, "important . . . questions of first impression concerning statutory interpretation." United Transp. Union v. Dole, 797 F.2d 823, 827 (10th Cir. 1986). Nor do [*54] we address the suggestion in NLRB v. Semco Printing Ctr., Inc., 721 F.2d 886, 893 & n.4 (2d Cir. 1983), that review is permissible in administrative enforcement proceedings when an argument is not advanced or is merely referenced in a footnote. We simply hold that we need not reach the merits in this case, because the cross-appellant has not properly preserved the issue.

CONCLUSION

Because of our ruling that the Brady Act's imposition on CLEOs is constitutional, we need not decide whether the

background check provision is severable from the remainder of the Act. Insofar as the judgment of the district court ruled that Sheriff Frank has standing to challenge the Brady Act on Tenth Amendment grounds, it is affirmed; insofar as it ruled that the interim background check requirement of the Brady Act violates the Tenth Amendment, it is reversed and that portion of the Brady Act is found constitutional; and, finally, insofar as it declined to reach the merits of cross-appellant's Fifth Amendment claim, it is affirmed.

Affirmed, in part, and reversed, in part.

CONCURBY: MINER

CONCUR: MINER, Circuit Judge, concurring in the result:

I am of the opinion that Sheriff Frank lacked standing [*55] to maintain this action and therefore see no need to pass on the constitutional claims that he advances. Accordingly, I agree with my colleagues only to the extent that judgment should be entered for appellant.

There are three requirements that must be met to establish a case or controversy calling for the exercise of federal judicial power under Article III of the Constitution: first, the plaintiff must have suffered an injury in fact--an injury that is actual or imminent, not hypothetical or conjectural, is concrete and is seen to "affect the plaintiff in a personal and individual way," Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 & n.1, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); second, the injury must be fairly traceable to the defendant's challenged action and not caused by the independent action of a third party, id. at 560; and third, it must be likely, not just possible, that the injury will be redressed by a favorable

court ruling, id. at 561.

I cannot perceive how the Brady Act has caused Sheriff Frank to suffer any injury in fact within the meaning of Lujan. My colleagues properly decide that a Chief Law Enforcement Officer ("CLEO") can be a state official as well as a local official [*56] within the intendment of the Brady Act. The Act does not appear to impose CLEO duties upon anyone unwilling to undertake them. A locality may have any number of officers who fit the definition of CLEO--Chief of Police, Sheriff or State Commissioner of Public Safety. Sheriff Frank voluntarily took on the CLEO function, apparently for the sole purpose of challenging the Brady Act. His instigation of this lawsuit impelled Commissioner Watson of the Vermont Department of Public Safety to conclude that Sheriff Frank really did not desire to perform the duties of a CLEO. Accordingly, the Commissioner requested the Bureau of Alcohol, Tobacco and Firearms to change the CLEO designation in Orange County, where Sheriff Frank holds forth. The Bureau has agreed to treat Lieutenant Contois of the Vermont State Police as the CLEO for Orange County because of the Sheriff's apparent unwillingness to act. What actual injury has the Sheriff suffered? How has he been affected in a personal and individual way?

My colleagues say that "administrative burdens" constitute the concrete injury contemplated by the standing requirement. The administrative burdens, they say, consist of working together with [*57] state and local officials to determine which agency would perform the CLEO function. Because Sheriff Frank is responsible for participating in this decision-making process, he must "undertake an analysis" of his own procedures and capabilities, supposedly an onerous

administrative burden. It just does not seem to me that a simple decision to pass up the CLEO job constitutes any sort of a "burden," let alone one that amounts to an injury in fact.

There is yet another "burden," according to my colleagues, that justifies a finding of the requisite actual or imminent injury--that the state police may at some time in the future decide to discontinue CLEO duties in Orange County and Sheriff Frank might then have to assume those duties. Accordingly, it is said, the Sheriff must so structure his operations as to be ready for this eventuality. However, there is no suggestion whatsoever that the state police have any intention of giving up the CLEO function in Orange County. It certainly cannot be said that any such action is "imminent." Also, there is nothing to say that some other law enforcement agency will not take up the duties in the event the state police gives them up. In any event, [*58] it is sheer speculation to say that the duties might someday be imposed on Sheriff Frank. The administrative burdens cited constitute a very thin reed upon which to rest a finding of injury sufficient to confer standing.

I very much disagree with the proposition that Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir.), cert. denied, 434 U.S. 902, 54 L. Ed. 2d 188, 98 S. Ct. 296 (1977), supports Sheriff Frank's standing claim. In Friends, we were presented with the question of whether the City of New York (the "City") had standing to claim that enforcement of a pollution control plan, promulgated by the State of New York pursuant to the Federal Clean Air Act, represented an invasion of the City's sovereignty in violation of the Tenth Amendment. Id. at 33. The pollution control plan at issue in Friends was promulgated in accordance with a federal statutory scheme

that provided states with the choice of promulgating their own pollution control plans or submitting to a plan promulgated by the Environmental Protection Agency. Id. at 30. New York State, with the assistance of the City, promulgated a plan (the "Plan") to meet the federal air quality standards in the City, and the Plan became binding [*59] upon and enforceable against both the state and the City.

The City, a defendant in the action that sought to compel it to enforce the Plan, claimed that "a judgment directing it to enforce the Plan would interfere with its governmental interests in allocating funds, police resources and in making policy decisions." Id. at 33. We held that "the City's claim satisfies traditional notions of standing since the City is allegedly threatened with injury to its governmental interests and is within the class of entities which the Supreme Court has held to be protected from incursions of federal power." Id.

The City in Friends suffered a far more concrete and particularized injury than Sheriff Frank presents in the instant case. First of all, while the City in Friends was the subject of an action seeking to compel it to enforce the Plan, Sheriff Frank has not been compelled to comply with the requirements of the Brady Act. Indeed, the sheriff volunteered to assume CLEO duties and was relieved of his responsibilities immediately after he objected to performing those responsibilities. Moreover, Sheriff Frank cannot demonstrate that it is even remotely possible that he would be required [*60] to perform the CLEO duties in the future. Therefore, his claim of injury is merely "hypothetical" and "conjectural."

In Friends, the City sustained a severe invasion of a

legally protected interest. The City there was faced with the possibility of being compelled to enforce a plan to meet federal air quality standards for carbon monoxide, hydrocarbons, oxidants, and nitrogen dioxide. Here, Sheriff Frank was required to work with other law enforcement officials to decide who would assume the CLEO duties. This really cannot be compared with the burden of complying with federal air pollution standards in the New York City metropolitan area. Sheriff Frank cannot point to any concrete injury. Accordingly, he has no standing to put forward his constitutional challenges to the Brady Act.

860 F. Supp. 1030

Sheriff Samuel Frank, Plaintiff, v. United States of America, Defendant.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

August 2, 1994, Decided
August 2, 1994, Filed

COUNSEL: [**1] For Plaintiff: Andrea L. Gallitano, Esq., Otterman & Allen, Barre, VT.
For Defendant: Thomas D. Anderson, Esq., Assistant U.S. Attorney, District of Vermont, Burlington, VT and Michael Sitcov, Esq., U.S. Department of Justice, Washington, DC.

JUDGES: Parker
OPINIONBY: FRED I. PARKER
OPINION: [*1031] FINDINGS OF FACT, OPINION AND ORDER

This matter came before the Court on plaintiff's Motions for a Temporary Restraining Order and/or Preliminary Injunction. The Court held a hearing on the Motion for a Preliminary Injunction on June 2, 1994. At that time the parties agreed to consolidate the hearing with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). After considering all testimony, affidavits and arguments submitted by the parties, n1 the Court enters the following findings of fact, opinion, and order on the merits of this case.

----------Footnotes----------

n1 The Court also considered the amicus curiae brief submitted by Handgun Control, Inc., Center to prevent Handgun Violence, Major Cities Chiefs of Police, International Association of Chiefs of Police, National Association of Police Organizations, Fraternal Order of Police, Police Foundation, Federal Law Enforcement Officers Association, Police Executive Research Forum, National Troopers Coalition, and National Organization of Black Law Enforcement Executives. Further references to this brief will be designated "Amicus Brief, p. ".

----------End Footnotes----------

[**2]

Findings of Fact

1. Sheriff Samuel Frank is the elected Sheriff of Orange County, Vermont, a jurisdiction of 992 square miles with a population of approximately 26,000 persons.

2. The Orange County Sheriff's Department consists of two full time law enforcement officers: Sheriff Frank and Deputy Dennis McClure.

3. The duties of the Sheriff are defined by 24 V.S.A. Chapter 5, subchapter 5.
[*1032] 4. On a typical day, the Sheriff's office will have the Sheriff and one full time deputy on duty.
5. The Sheriff's Department provides court security in the county, transports state prisoners, transports some mental health patients, serves process and writs, investigates crime, and patrols the jurisdiction.
6. Funding for the Sheriff's Department comes from three sources: the State of Vermont, Orange County, and private security contracts.

7. The Vermont State Police respond to criminal activity in Orange County, enforce motor vehicle laws, and patrol the county. The Vermont State Police do not provide court security, prisoner transport, mental health transport, or service of process in Orange County.
8. On January 21, 1994 the Bureau of Alcohol, Tobacco, and Firearms (ATF) sent an [**3] "Open Letter to State and Local Law Enforcement Officials" on the topic of the so-called Brady Bill. n2 In this letter ATF discussed the definition of chief law enforcement officer ("CLEO"), which the Brady Bill defines as "the chief of police, the sheriff, or an equivalent officer or the designee of such individual," and stated its opinion that the definition of CLEO was broad enough, in some cases, to apply to more than one official in a given jurisdiction. The letter also expressed ATF's opinion that, in jurisdictions where more than one official satisfied the definition of CLEO, law enforcement officials could agree on having only one serve as CLEO.

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n2 Further References will be to "ATF Open Letter."

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9. On January 31, 1994 a meeting of all interested law enforcement agencies was held at Norwich University to discuss the implementation of the Brady Act in Vermont. At this meeting, representatives of local law enforcement agencies, the Vermont State Police, and the Bureau of Alcohol, Tobacco and Firearms (ATF) [**4] were present.
10. At the meeting, the obligations of CLEOs under the Brady Act was discussed.
11. Also at the meeting, James Walton, the Commissioner of Public Safety in Vermont, stated that the Vermont State Police was willing to function as the CLEO for Brady Act purposes, for any jurisdiction in which the sheriff or local police department declined to accept that responsibility.
12. Sheriff Frank stated his willingness to serve as CLEO for Orange County at the meeting, believing that the he was required to do so because he was the Sheriff or Orange County and thus directly implicated by the Act.
13. In his capacity as CLEO, Sheriff Frank received notices of proposed firearm transactions from federally licensed dealers, and either Sheriff Frank or his Deputy conducted some type of background check, ranging in time from 15 minutes to six hours, for each proposed transaction to attempt to determine whether it would violate the law.
14. Prior to the enactment of the Brady Act, Sheriff Frank would sometimes conduct criminal record checks in the normal course of his duties. The Sheriff's Department workload with respect to background checks approximately doubled after the Brady [**5] Act became effective.
15. On May 10, 1994 Sheriff Frank filed this case, seeking to have enforcement of the Brady Act enjoined and declared unconstitutional as violative of Article I, sec. 8, as well as the Fifth and Tenth Amendments of the Constitution.
16. Upon learning of the instant challenge to the Brady Act,

Commissioner Walton wrote to Sheriff Frank and informed him he was requesting ATF to substitute Lt. George Contois of the Vermont State Police for Sheriff Frank as the CLEO for Orange County because Commissioner Walton believed that Sheriff Frank's conduct in challenging the Brady Act's constitutionality was evidence of his desire not to serve as CLEO.

17. After receiving Commissioner Walton's letter, Sheriff Frank has continued to perform background checks when he is notified of a proposed transfer by federal firearms dealers.
18. Sheriff Frank has not received notice from any party other than Commissioner [*1033] Walton regarding his status as CLEO for Orange County.

Conclusions of Law, Opinion and Order

To properly analyze Sheriff Frank's challenge to the Brady Act, it is necessary to review both the statutory framework of the Gun Control Act and the provisions of the [**6] Brady Act itself prior to any discussion of Sheriff Frank's complaint.

I. Statutory Framework

The so-called Brady Act amends the Gun Control Act of 1968, 18 U.S.C. @ 921 et. seq., which created a federal regulatory scheme governing the manufacture and distribution of firearms by private persons. One feature of the Gun Control Act is a requirement that a federal license be obtained to engage in the business of manufacturing, importing, or dealing in firearms in interstate or foreign commerce. 18 U.S.C. @ 923(a). Licensees are required to maintain records of their transactions and to allow the Bureau of Alcohol, Tobacco, and Firearms to inspect the records. 18 U.S.C. @ 923(g). Licensees are also prohibited from transferring firearms or ammunition to any person the licensee knows, or has reasonable cause to believe: is under

indictment for, or has been convicted of a crime punishable by imprisonment for a term exceeding one year; is a fugitive from justice; is an unlawful user of certain illegal substances; has been adjudicated a mental defective; is an illegal alien; has [**7] been dishonorably discharged from the armed forces; or has renounced his or her U.S. citizenship. 18 U.S.C. @ 922(d)(1)-(7).

Prior to the passage of the Brady Act, federal firearms dealers were required to have customers fill out ATF form 4473, on which the customer certified that he or she was not prohibited by law from receiving or possessing a firearm. 27 C.F.R. @ 178.124. This self-certification was the only method by which a federal firearms dealer could determine whether or not a transfer was prohibited.

II. The Brady Act

The interim provisions n3 of the Brady Act alter the prior scheme by imposing on the licensed dealers an obligation, under certain circumstances, n4 to have the prospective transferee fill out an ATF Form 5000.35. 59 Fed. Reg. 7110, 7112, Feb 14, 1994. On this form the transferee must provide a statement that includes his or her name, date of birth, and address as they appear on a designated piece of picture identification. 18 U.S.C. @ 922(s)(3)(A). The transferee must also state under oath that he or she is not barred from purchasing or receiving a firearm [**8] in interstate or foreign commerce. 18 U.S.C. @ 922(s)(3)(B). The licensed dealer must then transmit the contents of the form to the Chief Law Enforcement Officer ("CLEO") of the place of residence of the prospective purchaser within one day of its completion and send a copy of the form to that official. 18 U.S.C. @ 922(s)(1)(A)(i)(III)-(IV).

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n3 The challenged provisions of the law all relate to its

interim provisions, which involve local law enforcement in the determination of whether a transfer of a firearm is prohibited. The Brady Amendment provides for the eventual use of a national instant background check system that licensed dealers can contact by phone or otherwise to determine whether a transfer is prohibited. 18 U.S.C. @ 922(t)(1). The involvement of local law enforcement is contemplated under the Amendment only until such time as the national system is operational, but not later than 1999. Pub. L. 103-159, Sec. 103(b). Thus it is the interim provisions and not the permanent provisions of the law that are challenged by Sheriff Frank. [**9]

n4 No waiting period or background check is required under certain circumstances. See 18 U.S.C. @ 922(s)(1)(B)-(F).

----------End Footnotes----------

Upon receipt of the form, the Brady Act dictates that the CLEO "shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. @ 922(s)(2). The federally licensed dealer is prohibited from transferring the firearm until he or she is advised by the CLEO that the transfer would not be illegal, or until 5 days have elapsed since the CLEO received notice of the proposed [*1034] transfer, whichever occurs first. 18 U.S.C. @ 922(s)(1)(A).

In the event that it is determined that the proposed transfer does not violate the law, the CLEO is also required to destroy any records received or generated due to the notice of proposed transfer within twenty days [**10] after the

completion of the pretransfer application. 18 U.S.C. @ 922 (s)(6)(B)(i). A purchaser who is determined ineligible to receive a handgun based on the CLEO's investigation may, upon request, obtain a written explanation from the CLEO explaining the reasons for denial. 18 U.S.C. @ 922(s)(6)(C).

The Brady Act also contains a penalty provision, 18 U.S.C. @ 924(a)(5), which states: "Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $ 1,000, imprisoned for not more than 1 year, or both."

III. The Complaint

Sheriff Frank's complaint seeks declaratory and injunctive relief concerning enforcement of the Brady Act. He contends that certain provisions of 18 U.S.C. @ 922(s), specifically @ 922(s)(2) (requiring CLEOs to make a reasonable effort to ascertain whether a proposed transfer would violate the law), @ 922(s)(6)(B) (requiring CLEOs to destroy records relating to background checks), and @ 922(s)(6)(C) (requiring CLEOs to provide written reasons to those who are determined ineligible for the transfer [**11] of a handgun) exceed Congressional authority under Article I, Section 8 of the Constitution and the Tenth Amendment. Sheriff Frank also interprets the penalty provision of the Brady Act, 18 U.S.C. @ 924(a)(5) as providing for criminal penalties against local law enforcement authorities who do not comply with its provisions. In this regard, he raises a Fifth Amendment due process argument, claiming that the provisions of the Brady Act are unconstitutionally vague.

IV. Discussion

A. Can Sheriff Frank Challenge the Brady Act?

The Government asserts that the Court should not reach the merits of Sheriff Frank's challenge to the Brady Act because he lacks standing. This argument takes two forms. First, the

Government argues that Sheriff Frank is not the real party in interest and is not authorized to bring suit in his official capacity under Vermont law. Second, the Government argues that assuming he has the capacity to sue and is a real party in interest, Sheriff Frank lacks standing because he volunteered to be the CLEO for Orange County and has therefore suffered no injury traceable to the Brady Act.

1. Capacity and Real Party in Interest Status [**12]

The Government argues that "under Vermont law, plaintiff is a county officer, 24 V.S.A. @ 290, but lacks authority to initiate this litigation in his official capacity. Instead, Vermont law expressly confers the authority to sue or be sued on counties themselves. Id. @ 136." Thus the Government's position is that Sheriff Frank is really asserting the legal rights of Orange County, which he is not authorized to do. Fed. R. Civ. P. 17(a) and (b).

However, the matter is not as simple as the Government contends. The office of sheriff is created by Chapter II of the Vermont Constitution, sections 43, 50, and 53. Sheriffs are elected by the freemen of their districts under Chapter II @ 50 of the Vermont Constitution, and the county as such has no part in the selection of a sheriff. Nor can the county remove a sheriff from office, which, aside from the election process, can be done only through an impeachment process before the Vermont State Legislature under Chapter II @ 57 of the Vermont Constitution. The state, not the county, sets the salary of the sheriff. 32 V.S.A. @ 1182.

Moreover, the duties of the sheriff are set by state statute, not by the county. The executive officers of [**13] the county are assistant judges, 24 V.S.A. @ 131 et seq. who are given no authority to direct the sheriff's duties. Thus Sheriff Frank, though a statutory employee of the county, 24 V.S.A. @ 290, functions independently of the county in many important respects. Viewed in this light, it is unclear that the

county would be the real [*1035] party at interest in this case. The Brady Act asks nothing of the county qua county. To the extent that Brady directs Sheriff Frank to undertake duties other than those that he would do in the absence of Brady, the county, which has no control over the sheriff's duties in the first place, does not suffer any injury. Given this situation, the Government's argument that 24 V.S.A. @ 136, which states that "actions in which a county is the party in interest shall be brought by or against the county . . ." (emphasis added) deprives Sheriff Frank of capacity to sue is misplaced. It is the sheriff, not the county, who is directed to take action by the Brady Act and who must attempt to reconcile these actions with his Vermont statutory mandates and oath of office. The county faces no similar dilemma.

Whether or not the county could have brought this action, [**14] it is clear to the Court that, subject to the standing considerations that will be discussed below, Sheriff Frank must have capacity to initiate this challenge. As noted by the Court in McGee v. United States of America, 1994 U.S. Dist. LEXIS 10610 *5 (S.D. Miss., June 2, 1994), a similar challenge to the Brady Act:

It would be anomalous indeed if Congress can direct a sheriff to take specific action; if Congress may provide that a sheriff may be sued in civil rights actions; and if sheriffs can be sued for deprivation of constitutional rights by inmates; but a sheriff cannot bring a suit to declare unconstitutional an action of Congress that directly impacts upon such sheriff, and impacts upon no other state, county or federal official.

A determination that Sheriff Frank has capacity to bring the action as Sheriff does not end the inquiry. The Government's contention that Sheriff Frank lacks standing because he has suffered no injury traceable to the Brady Act must also be addressed.

2. Standing

The Government claims that Sheriff Frank lacks standing because he has not demonstrated that he has suffered, or is in imminent danger of suffering, a distinct and [**15] palpable "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). This argument stems from the fundamental principle that federal court jurisdiction is limited by Article III to cases and controversies. As the Supreme Court explained in Lujan v. Defenders of Wildlife, 119 L. Ed. 2d 351, 112 S.Ct. 2130, 2136 (1992) ". . . the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."

In Lujan, the Supreme Court discussed the requirements of standing. Id. at 2135-37. It found that "the irreducible constitutional minimum of standing contains three elements." Id. at 2136. The three elements that must be shown are: (1) an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, actual or imminent and not conjectural or hypothetical; (2) a causal connection between the injury and the conduct; and (3) a likelihood [**16] that the injury will be redressed by a favorable decision. Id.

a. Injury in Fact

Sheriff Frank's claimed injury is that, by functioning as CLEO, he has used some portion of his department's finite resources completing tasks that are not part of his Vermont statutory duties. In this case, Sheriff Frank testified and the Court found that each background check he does on a prospective gun purchaser takes a minimum of fifteen minutes and sometimes up to six hours. Moreover, Sheriff Frank argues that the Brady Act forces him to expend funds and resources in a manner inconsistent with the scope of his

duties as outlined in 24 V.S.A. ch. 5, subch. 5 and thus compliance with Brady "places him at risk of violating his oath of office, impeachment, and diminished re-election potential." Plaintiff's Second Memorandum in Response, p. 11. Sheriff Frank also fears that he either faces criminal prosecution pursuant to 18 U.S.C. @ 924 or the appearance to his constituents that he is [*1036] not law abiding if he does not comply with Brady.

The Government interprets Brady as requiring merely an exercise of discretion on the part of Sheriff Frank and argues that this [**17] "mandatory" discretionary duty is consistent with Constitutional requirements. As for Sheriff Frank's fear of criminal prosecution, the Government has interpreted 18 U.S.C. 924(a)(5) as not providing criminal penalties for CLEOs. See Memorandum for Janet Reno, Attorney General from Walter Dellinger, Office of Legal Counsel, March 16, 1994.

With regard to Sheriff Frank's Fifth Amendment claim, I agree that he has not shown injury because he has not been prosecuted under the statute nor is he in any imminent danger of being prosecuted because the Office of Legal Counsel for the Department of Justice has taken the position that Brady's criminal penalty provisions do not apply to CLEOs acting in their official capacity. See id. Therefore, he lacks standing to challenge the statute on vagueness grounds because he will not be subject to criminal penalties whether or not he complies with Brady. n5

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n5 The Court notes its agreement with the Office of Legal Counsel Opinion that "the absence of a definitive standard inherent in the term "a reasonable effort" would very likely pose an insurmountable hurdle to successful prosecution or raise a substantial due process question" if the Government were ever to reverse field and try to prosecute a CLEO for

failing to perform his or her duties as required by the Brady Amendment.

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The Government's responses to Sheriff Frank's claim of injury with regard to his Tenth Amendment claim, however, do not directly refute Sheriff's Frank's claim of ongoing injury. Rather, they actually go to the question of whether or not it is Brady or Sheriff Frank himself that has inflicted the injury. Accordingly, these arguments will be addressed below.

b. Causation

The heart of the Government's standing argument is that Sheriff Frank volunteered to be the CLEO for Orange County when he was under no obligation to do so. As such, the Government maintains, any injuries he has suffered are entirely self-inflicted, cannot be traced to the defendant's conduct, and therefore cannot provide him with standing to challenge the constitutionality of the Brady Act. See Petro-Chem Processing Inc. v. EPA, 275 U.S. App. D.C. 232, 866 F.2d 433, 438 (D.C. Cir.), cert. denied, 490 U.S. 1106, 104 L. Ed. 2d 1020, 109 S. Ct. 3156 (1989) (self-inflicted injuries cannot form the basis for standing to challenge statute).

Prior to an evaluation of the Government's position, a more detailed discussion of both the statute and the facts surrounding Sheriff Frank's [**19] designation and removal as the CLEO for Orange County is necessary.

As discussed above one feature of the Brady Act is its requirement that federal licensees have prospective handgun purchasers complete an ATF form and that licensees notify the "chief law enforcement officer of the place of residence

of the" purchaser of the contents of the form. 18 U.S.C. @ 922(s)(1)(A)(III). The CLEO is then subject to the provisions of Brady that Sheriff Frank has challenged here. The Brady Act defines CLEO ("chief law enforcement officer") as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. @ 922(s)(8).

While Sheriff Frank is plainly within the definition of CLEO, the Government's position, as explained in an ATF Open Letter to State and Local Law Enforcement Officials, is that the definition is "broad enough, in some cases, to give the [firearms dealer] more than one official to contact" and that "the law will clearly permit law enforcement officials to agree that, within a given jurisdiction, one agency will serve the role as CLEO." ATF Open Letter, p.8

On January [**20] 31, 1994, the Commissioner of the Vermont State police and the senior ATF agent for Vermont held a meeting for all interested law enforcement officers to discuss Brady. At that meeting Commissioner Walton took the position that designation as CLEO for Brady purposes was voluntary, and that the state police would serve as CLEO in any jurisdiction in which the elected [*1037] law enforcement official did not want to undertake the CLEO's responsibility. At the meeting Sheriff Frank indicated that he would serve as the CLEO for Orange County.

After this case was filed Commissioner Walton sent Sheriff Frank a letter in which he expressed his concern that the Sheriff had chosen to attack the Brady Act's constitutionality. Commissioner Walton also stated that he was requesting that ATF delete Sheriff Frank from its list of CLEOs and substitute Lieutenant G.C. Contois of the Vermont State police as the CLEO for Orange County.

Thus the Government argues that Sheriff Frank does not have, and never has had, standing because he never had to

undertake the role of CLEO, but could have let Commissioner Walton designate the Vermont State police as CLEO for Orange County.

Sheriff Frank takes issue with the [**21] Government's conclusion that the Vermont State police is an "equivalent officer" for the purposes of the definition of chief law enforcement officer. Although the Vermont State police are given powers equivalent to those of sheriffs by 20 V.S.A. @ 1914, Sheriff Frank takes the position that the intent of Brady was that local law enforcement, not the state police, were intended to perform the Brady background checks and therefore the Vermont State Police are not "equivalent officers" and can not relieve him of his Brady obligations. Sheriff Frank essentially argues that Commissioner Walton's "offer" to have the Vermont State Police serve as CLEO was ineffectual because the Vermont State police do not fit the statutory definition of CLEO.

The Government argues that although "equivalent officer" is nowhere defined in the statute, "that term must, at a minimum, include any official whose powers are the same as a 'sheriff' or a 'chief of police.'" Defendant's Opposition To plaintiff's Motion for a Preliminary Injunction, at 20. Furthermore, the Government urges that ATF's interpretation of the statute be should given substantial weight. Chevron v. Natural Res. Def. Council, 467 U.S. 837, 844-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). [**22]

However, ATF's construction is entitled to substantial weight only where the intent of Congress in unclear.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress.
Id. at 842. In this instance the Court finds that the statute clearly contemplates that background checks will be done by local, and not state, law enforcement officials and that ATF's interpretation is contrary to the intent of Congress. n6

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n6 The only issue that needs be addressed here is whether the state police in Vermont are "equivalent" to a sheriff or a chief of police. There is no need to reach the question of whether the language of the Brady Act's CLEO definition allows for more than one CLEO in a given jurisdiction, although it seems that the term "equivalent officer" could easily be read to mean the chief local law enforcement officer of the jurisdiction in the event that a given jurisdiction does not empioy the term "chief of police" or "sheriff."

However, the Court will assume that more than one CLEO may exist in a given jurisdiction and limit the inquiry to the question of whether the Vermont State Police are "an equivalent officer" to the Sheriff of Orange County.

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The first clue that Congress did not intend for state law enforcement officials to be serving as CLEO's is that the definition of CLEO does not include any reference to them. This fact is particularly significant when the CLEO definition is compared to the Brady Act's provisions relating to the reporting of multiple firearms sales. These provisions require federal licensees to prepare reports of multiple handgun sales and forward them to "the department of state police or state law enforcement agency of the state or local law enforcement agency of the local jurisdiction in which the

sale or other disposition took place . . ." 18 U.S.C. @ 923(g)(3)(A) (Emphasis added). The amendments also provide that ". . . the department of state police or state law enforcement agency of the state or [*1038] local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form . . ." 18 U.S.C. @ 923(g)(3)(B) (Emphasis added). These provisions strongly indicate that where Congress intended to impose duties that could be fulfilled [**24] by either state or local law enforcement officials, it did so explicitly.

The legislative history of the Brady Act confirms this interpretation. The House Report "Summary and Purpose" section describes the bill as follows: "Local law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited by law from buying a gun." H.R. Rep. No. 344, 103d Cong. 1st. Sess. p. 7 (1993) reprinted in 1993 U.S.C.C.A.N. 1984. (Emphasis added.) In the section "Brief Explanation of H.R. 1025," under the heading "the waiting period" the intent of the Congress is again revealed: " . . . the transferor would be required to notify local law enforcement officials of the proposed sale. . . . The bill requires local law enforcement officials to make a reasonable effort . . ." Id. at 10.

Prior to the initiation of this case, ATF itself apparently felt that the background checks were to be conducted by local law enforcement, stating in its open letter:

. . . the law is designed so that the law enforcement authority who is doing the check, is the one who is most likely to have to deal [**25] with the consequences of the buyer obtaining a handgun. Therefore, the CLEO of the buyer's residence has a vested interest in conducting an appropriate check and ultimately is in the best position to determine what

is reasonable. ATF Open Letter, p. 10.

Even in the absence of the foregoing evidence of Congressional intent regarding state police generally serving as CLEOs, there are practical reasons why the Vermont State Police cannot be considered the "equivalent" of Sheriff Frank even if their legal authority is the same under state law. Attorney General Reno, in urging one of the Brady Bill's chief sponsors to reject proposed amendments to the Brady Bill that would establish a date certain for establishment of a federal instant check system, wrote:

Background checks performed by local police remain the most effective means of screening out ineligible gun buyers. It is local law enforcement who best know the residents and residencies within their communities. Local law enforcement can check to see if a given purchaser resides at the given address, and can access local, county, state, and national records whether they are in file folders or computerized. Letter from Attorney [**26] General Reno to Rep. Charles Schumer (Nov. 9, 1993) (Ex. 1 attached to Amicus Brief).

The reasons given by Attorney General Reno in support of having local law enforcement perform background checks demonstrate why state and local officials may not be equivalent even if they are given the same powers under state law. n7 Sheriff Frank testified and the Court found that his department transports prisoners and mental health patients in the county, provides court security in the county, and maintains local records, many of which are not computerized. All of these activities put the Sheriff in a unique [*1039] position in terms of his familiarity with the local citizenry of Orange County. The state police, while given equivalent legal authority in the county, do not perform any of these functions on a regular basis. It is clear that Congress sought to take advantage of the local law

enforcement's familiarity with the population when the background check provision was drafted. For this reason, the Court finds that the Vermont State police cannot be considered the CLEO for Orange County because they are not an "equivalent" to Sheriff Frank.

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n7 The Government's syllogism in support of their position that the state police are "equivalent officers" to the sheriff runs as follows: (1) the sheriff's powers are defined by statute; (2) the state police have "the same powers with respect to criminal matters and the enforcement of the law relating thereto as sheriffs . . ." 20 V.S.A. @ 1914; (3) therefore the state police are an "equivalent officer" under he Brady definition of the CLEO. This argument fails to acknowledge that entities with the same powers under state law are not necessarily equivalent.

As an example, the Court notes that under Vermont law, a sheriff who has completed certain training requirements may exercise his or her powers, "with respect to criminal matters and the enforcement of law", on a statewide basis. 24 V.S.A. @ 312. If one were to adopt the Government's expansive interpretation of "equivalent officer", not only the state police, but also the sheriff of any other county in the state, could serve as the CLEO for Orange County because, in a jurisdictional sense, they would have the same powers with respect to criminal matters in Orange County as Sheriff Frank.

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Even if the state police could fulfill the role of CLEO for Orange County, it is not clear to the Court that Sheriff Frank has ever been removed as CLEO or that any federal agency

has informed Sheriff Frank that he does not have any obligations under the Brady Act. The only proof offered on this point by the Government is a letter from Commissioner Walton of the Vermont State police to Sheriff Frank, which states that Commissioner Walton will request that ATF remove Frank's name from its list of CLEOs. n8 Notably, the Government's brief is completely bereft of reference to any authority that gives the State of Vermont the power to relieve Sheriff Frank of an obligation imposed under federal law. n9 Sheriff Frank has understandably continued processing background checks under the assumption that the he is still the CLEO because he has never received notice to the contrary from any federal agency. Accordingly, to at least some extent, Sheriff Frank is still functioning as the CLEO.

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n8 The Government asserts in its brief that ATF has removed Sheriff Frank from the CLEO position and substituted the Vermont State Police. However, the Government left the citation to the Federal Register blank. The Court has conducted several database searches in an attempt to find any reference in the Federal Register to a change in the CLEO for Orange County but has been unable to do so. [**28]

n9 The Government's brief mentions that "the State Police would designate itself as the CLEO for any jurisdiction where local law enforcement officials who also satisfied the CLEO definition did not want to perform the CLEO's duties. . . . Plaintiff volunteered to assume the CLEO's duties for Orange county, and was designated as such by the Commissioner." Gov. brief at 21. Implicit in the Government's description is the assumption that the Commissioner of the State Police, as opposed to ATF or a local official, has the power to "designate" itself or someone

else as the CLEO for any jurisdiction in Vermont. Given that the state police are not mentioned in the definition of CLEO, it would seem odd that the statute delegates to the state police the power to "designate" Sheriff Frank as the CLEO for Orange County, or to "designate" itself CLEO if Sheriff Frank challenges the constitutionality of the statute.

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In sum, Sheriff Frank is in the following position. A federal law imposes certain arguably unconstitutional obligations on chiefs of police, sheriffs, or equivalent officers. As a Sheriff, Frank [**29] reasonably believes he must comply with the law and has done so, but has challenged the constitutionality of the law. A third party, the State of Vermont, claims to be an equivalent officer and has told Sheriff Frank that it will assume his federal obligations because his challenge to the law makes it clear that he no longer wishes to comply with it. Sheriff Frank does not agree that the third party is legally his equivalent, nor does he believe that the third party, which is not a federal agency, can excuse him from performance of his duties. He therefore seeks a Court order declaring the law unconstitutional but has continued to perform the functions required under the law because no party with the authority to relieve him of his federal obligations has done so.

For all of the above reasons, the Court finds that Sheriff Frank's injuries are directly traceable to the Brady Act and that Commissioner Walton's offer to serve as CLEO did not deprive Sheriff Frank of standing because: (1) the state police in Vermont are not "equivalent officers" under 18 U.S.C. @ 922(s)(8) and cannot serve as CLEOs; (2) Sheriff Frank has never been removed as CLEO by [**30] a party with authority to remove him; and (3) the state police never had the power to relieve the Sheriff of his obligations under

the Brady Act in the first place. n10

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n10 The Court notes that while the imposition of federal mandates on local law enforcement officials and the subsequent agreement of a state entity to voluntarily assume the federal responsibilities of the local official has created somewhat unique standing questions, the result is generally consistent with the Supreme Court's observation in Lujan that: When the suit is one challenging the legality of government action . . . the nature and extent of facts that must be proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgement preventing or requiring the action will redress it. 112 S. Ct. at 2137.

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[*1040] c. Redressability

It is clear that a decision by this Court in favor of Sheriff Frank will redress his injuries in that he will no longer have to perform background checks at all if enforcement of the Brady Act is enjoined. Because Sheriff Frank has shown injury in fact, causation, and redressability, he has standing to bring his claim, the merits of which will now be addressed.

B. The Tenth Amendment Challenge n11

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n11 Sheriff Frank's contention that the Brady Act is beyond the scope of Article I, sec. 8 is subsumed within the Tenth Amendment analysis and will not be addressed separately. The Tenth Amendment only applies to powers " . . not delegated to the United States . . . ." Therefore, any Tenth Amendment argument is a de facto argument that the power in question was not delegated to the United States in another provision of the Constitution.

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Sheriff Frank's Tenth Amendment challenge to the Brady Act is relatively straightforward. He relies on New York v. United States, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) [**32] to support his contention that a federal statute may not direct him, a local official, to perform background checks or otherwise implement a federal program. Although the Government vigorously disputes Sheriff Frank's Tenth Amendment analysis, it also disputes that the Brady Act requires any action on his part. Rather, the Government reasons, Brady merely requires him to "consider" whether or not to perform a background check in any given case. Accordingly the Court must first determine what the Brady Act requires of Sheriff Frank prior to determining whether such requirements are constitutional.

1. Section 922(s)(2)

Section 922(s)(2) provides:

A chief law enforcement officer to whom a transferor has provided notice shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever

State and local recordkeeping systems are available and a national system designated by the Attorney General.

Sheriff Frank reads this provision as requiring that some sort of background check be performed by him. The Government, however, reads the "reasonable effort" provision expansively, concluding that [**33] a "reasonable" effort may be no effort at all. The ATF Open letter states, for example, that "in rural, sparsely populated counties where many handguns purchasers are personally known to the CLEO, little or no research may be necessary in many cases." ATF Open letter, page 10. n12

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n12 The Government places great weight on this statement as articulating the position of ATF with regard to the definition of reasonable effort. However, the ATF Open letter is less than consistent in its discussion of "reasonable effort." In addition to the portions of the letter quoted by the Government, the Open letter also states that "the law clearly anticipates some minimal effort to check commonly available records." (p. 9). In any event the fact that there may be some instances in rural counties when a handgun purchaser is personally known to the CLEO, making research unnecessary, does nothing to undercut the mandatory nature of the statute in all other cases.

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Once again, however, the Government's interpretation of the statute is [**34] clearly contrary to the intent of Congress. To begin, the statute states that CLEOs "shall" make a reasonable effort to determine whether a transfer is prohibited. Moreover, the Congress specifically rejected an amendment that would have changed "shall" to "may". H.R.

Rep. 344, 103d. Cong., 1st. Sess, p. 39 (1993) reprinted in 1993 U.S.C.C.A.N. 1984, 2009. It is hard to imagine a clearer indication of Congressional intent that a provision be mandatory rather than discretionary.

[*1041] Perhaps the most important phrase overlooked by the Government is "including research in whatever State and local recordkeeping systems are available and a national system designated by the Attorney General." The use of the word "including" indicates that a reasonable effort will include, at a minimum, research in the national system designated by the Attorney General and research in "whatever" State and local systems are available.

Thus the CLEO "shall" make a "reasonable effort" to ascertain whether a transaction is prohibited, "including" some designated research. These terms cannot be reconciled with the Government's contention that Sheriff Frank is not required to perform some type of background [**35] check when he receives notice of a proposed transfer (except, perhaps, in those instances when he might already have in mind all the necessary information).

The legislative history also reflects the mandatory nature of the background check. The Summary and Purpose section of the House report states: Local law enforcement officials are required to use the waiting period to determine whether the prospective purchaser has a felony conviction or is otherwise prohibited by law from buying a gun. Id. at 8 (emphasis added).

Furthermore, the "Brief Explanation" of the bill contained in the House report states:

The bill requires local law enforcement officials to make a reasonable effort to ascertain whether the prospective purchaser is forbidden from buying a handgun. This background check must be conducted within five business

days from the date on which the prospective purchaser first indicated his or her intention to purchase a handgun. Id. at 10 (emphasis added).

The Court concludes that the Brady Act places a duty on Sheriff Frank to perform some type of background check. The question then becomes whether such a requirement is consistent with the Tenth [**36] Amendment.

2. New York v. United States

New York v. United States, 120 L. Ed. 2d 120, 112 S. Ct. 2408, is the most recent Supreme Court case discussing the Tenth Amendment and the ability of the Congress to require states to regulate or to administer federal programs. n13 The issue in New York was the constitutionality of the Low Level Radioactive Waste Policy Act. The Act contained a "take title" provision that gave each state two options for dealing with certain kinds of radioactive waste within its borders. Id. at 2416. The states could either enact legislation consistent with Congressional directives or "take title" to the waste within its borders and face liability for all damages caused by the waste. Id.

----------Footnotes----------

n13 The Government bemoans the fact that "for all practical purposes" Sheriff Frank relies exclusively on New York. That observation is correct. Of course, if a party is going to rely exclusively on one case, the most recent Supreme Court case discussing the issue at hand is not a bad choice.

----------End Footnotes----------

[**37]

The Court found that because Congress did not have the authority to impose either option as a freestanding requirement, neither did it have the authority to offer a choice between the two. Id. at 2428. Justice O'Connor,

writing for the majority, was careful to point out that there are many permissible ways for Congress to encourage a State to regulate in a particular way. For example, Congress may attach conditions on the receipt of federal funds, South Dakota v. Dole, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987) (Congress may condition receipt of highway funds on the adoption of a minimum drinking age) or may, when operating pursuant to the Commerce Clause, offer States the choice of regulating a given area according to federal standards or having state law pre-empted by federal regulation. Hodel v. Virginia Surface Mining & Reclamation Assn, Inc. 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981) (upholding Surface Mining Control and Reclamation Act of 1977 because states were not compelled to enact federal program but could choose not to participate [**38] the federal program, [*1042] in which case regulation would fall to the Federal Government). Justice O'Connor explained why such "encouragement" from the Federal Government is permissible:

By either of these two methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the state retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the cost of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted. Where Congress encourages state regulation rather than compelling it, state governments remain responsible to the local electorate's preferences; state

officials remain accountable to the people. Id. at 2428.

In contrast, the take title provision in New York required the states to [**39] comply with one of two options, both dictated by the Federal Government, and was therefore invalidated. The Court explained: The take title provision appears to be unique. No other federal statute has been cited which offers a state government no option other than that of implementing legislation enacted by Congress. Whether one views the take title provision as lying outside of Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of Government established by the Constitution.
Id. at 2429.

New York controls the outcome of this case. Like the take title provision in New York, the background check provision of the Brady Act has provided no option to local officials but has merely directed them to administer the federal program. Whether a Vermont Sheriff is to be compelled to undertake the duty of conducting background checks is a decision that the Vermont Legislature, not the United States Congress, must make. This is so because the Vermont Legislature, not the United States Congress, is the only legislative body that can determine how these duties [**40] affect all other duties a sheriff is required to perform. It is the Vermont legislature that determines the Sheriff's salary and determines his or her duties. This enactment improperly commands action on the part of a local law enforcement official. There can be no doubt that such a command is unconstitutional. . . . one thing is clear: the Federal Government may not compel the states to enact or administer a federal statutory program. Id. at 2435.

The Government's attempts to distinguish New York are unavailing. Moreover, many of its arguments were flatly

rejected by the Court in New York. For example, the Government contends at one point that: "New York did not suggest that the federal government can never mandate that state governments assist in the enforcement of federal statutes." Defendant's Opposition To Plaintiff's Motion for a Preliminary Injunction, at 30. On the contrary, New York appears to suggest just that:

. . . the United States argues that the Constitution does, in some circumstances, permit federal directives to state governments. Various cases are cited to support this proposition, but none support it. Id. at 2429.

Of particular [**41] note is the Government's contention that New York is distinguishable because the statute at issue there was directed at states and completely dominated state legislative and regulatory processes. In essence, by making this argument the Government concedes that Congress could not compel the states to pass legislation requiring all local law enforcement officials to conduct background checks. What is remarkable is the Government's apparent contention that Congress is somehow on better constitutional footing if it by-passes the state legislature [*1043] altogether and directly compels state and local officials acting in their official capacity to undertake federally mandated duties. Of course, if this were the case, Congress would never have to encourage states to adopt legislation because it could simply "eliminate the middle man" and pass federal legislation requiring state officials to carry out the desired federal programs.

Other arguments advanced by the Government can be easily dismissed. As in New York, references to Tenth Amendment cases that discuss the authority of Congress to subject state governments to generally applicable laws, e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985); [**42]

National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), are inapposite because the Brady background check provisions are not generally applicable, but are directed solely at local law enforcement officials. See New York, 112 S. Ct. at 2420.

Nor is this a case addressing the ability of Congress to pass laws enforceable in state courts. E.g., Testa v. Katt, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947). Such cases merely involve application of the Supremacy Clause and are not concerned with the Federal Government's ability to compel non-judicial officers to implement federal programs. Although FERC v. Mississippi, 456 U.S. 742, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982), held that a state administrative body, the Mississippi Public Service Commission, could be compelled to adjudicate disputes arising under a federal statute, it is within this class of cases because the Court found that the administrative body was part [**43] of the "state adjudicatory machinery" and that the case was therefore controlled by Testa v. Katt. Id. at 760, 761. n14 Accordingly, neither Testa v. Katt nor FERC provide any support for the proposition that the Federal Government may command that non-adjudicatory state officials to carry out federal directives.

----------Footnotes----------

n14 The Court noted that any other decision would allow the States to disregard the pre-eminent position held by federal law. FERC, 456 U.S. at 761. No such concerns are present here, where no "state adjudicatory machinery" is involved.

----------End Footnotes----------

Finally, the Government (and amici) also discuss at length

the pressing need for federal legislation such as the Brady Act. I do not question the sincerity of those who have worked for passage of the Brady Act, nor do I at all dispute the fact that the Federal Government may regulate the transfer of firearms. n15 However, laudable ends cannot be [**44] used to justify unconstitutional means. Justice O'Connor addressed this very question in New York. Her words are equally applicable here:

Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. [The issue before the Court] is a pressing national problem, but a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse. New York, 112 S.Ct. at 2434.

----------Footnotes----------

n15 Although the subject of federal law challenged here is the transfer of handguns, this case has absolutely nothing to do with the Second Amendment or the right to bear arms. This case is about the ability of the Federal Government to require action on the part of local officials.

----------End Footnotes----------

[**45]

Believing as I do, that the Tenth Amendment of the United States Constitution prohibits the United States Congress from usurping the power of the Vermont State Legislature by requiring local law enforcement to administer this federal program, I conclude that 18 U.S.C. @ 922(s)(2) is unconstitutional. [*1044] 2. 18 U.S.C. @ 922(s)(6)(B) and 922(s)(6)(C)

Because @ 922(s)(2), which requires that CLEOs conduct a background check has been invalidated, @ 922(s)(6)(B) (which directs CLEOs to destroy records received or generated as a result of a background check if the transfer is allowed) and @ 922(s)(6)(C) (which directs the CLEO to provide a written explanation to a party whose proposed transfer is denied) are no longer mandatory provisions. These provisions will only apply to those CLEOs who choose to cooperate with @ 922(s)(2). No CLEO is compelled to comply with these provision because he or she can choose not to participate in background checks at all. Therefore, these provisions are not invalid once the mandatory nature of @ 922(s)(2) is eliminated.

C. Severability

In Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 94 L. Ed. 2d 661, 107 S. Ct. 1476, [**46] (1987) the Supreme Court established that "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operable as law." Id. at 684. Moreover, when Congress adopts a severability clause there is a presumption that the unconstitutional part of act is severable. Id. at 686. The Gun Control Act, which the Brady Bill amended, contains a severability clause. 18 U.S.C. @

928.

It is not evident to the Court that this presumption of severability has been overcome by the Plaintiff. Sheriff Frank baldly asserts that the Act would "serve no purpose" without mandatory background checks, but he provides no support for that proposition. Moreover, Sheriff Frank labors under the assumption that without a mandatory provision, no background checks will be done at all. However, to the extent that other Sheriffs or Chiefs of police elect to cooperate with federal officials in administering the Brady Act, [**47] the Act will function as Congress intended. Without the mandatory background check, the Act can operate as intended by Congress with the exception that local law enforcement would then have the option, rather than the obligation, of conducting a background check during the five-day waiting period. n16 Because the Act is still "fully operable as law" without a mandatory background check provision, the balance of the Brady Act remains fully operational.

----------Footnotes----------

n16 There can be no doubt that at least some CLEOs will find it in their own best interest to conduct background checks.

----------End Footnotes----------

CONCLUSION

The Court concludes that 18 U.S.C. @ 922(s)(2) is an unconstitutional mandate from Congress which violates the Tenth Amendment of the United States Constitution. The Court hereby ORDERS that judgement shall enter declaring section 922(s)(2) of Title 18 unconstitutional and void and permanently enjoins the United States from enforcing that provision in the District of Vermont. The remainder of the

Brady [**48] Act remains unaffected by the judgement or by this ORDER.

Dated at Burlington, in the District of Vermont, this 2 day of August, 1994.

Fred I. Parker

Chief Judge

--H.R.1025--
--Pub. L. 103-159--

One Hundred Third Congress
of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fifth day of January, one thousand nine hundred and ninety-three

An Act

To provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I--BRADY HANDGUN CONTROL

SEC. 101. SHORT TITLE.

This title may be cited as the "Brady Handgun Violence Prevention Act."

(a) INTERIM PROVISION-

(1) IN GENERAL- Section 922 of title 18, United States Code, is amended by adding at the end the following:

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun to an individual who is not licensed under section 923, unless--

(A) after the most recent proposal of such transfer by the transferee--

(i) the transferor has--

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of

the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii) (I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that--

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee--

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective

or been committed to a mental institution;

(v) is not an alien who is illegally or unlawfully in the United States;

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a

court of law.

(6) (A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph(1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for

such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(2) HANDGUN DEFINED- Section 921(a) of title 18, United States Code, is amended by adding at the end the following:

(29) The term "handgun" means--

(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and

(B) any combination of parts from which a firearm described in subparagraph (A) "can be assembled."

(b) PERMANENT PROVISION- Section 922 of title 18, United States Code, as amended by subsection (a)(1), is amended by adding at the end the following:

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B) (i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this

title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate section 922 (g) or (n) or State law, the system shall--

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

(A) (i) such other person has presented to the licensee a permit that--

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the

national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(c) PENALTY- Section 924(a) of title 18, United States Code, is amended--

(1) in paragraph (1), by striking paragraph (2) or (3) of; and

(2) by adding at the end the following:

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.

(a) DETERMINATION OF TIMETABLES- Not later than 6 months after the date of enactment of this Act, the Attorney General shall--

(1) determine the type of computer hardware and software that will be used to operate the national instant criminal background check system and the means by which State criminal records systems and the telephone or electronic device of licensees will communicate with the national system;

(2) investigate the criminal records system of each State and determine for each State a timetable by which the State should be able to provide criminal records on an on-line capacity basis to the national system; and

(3) notify each State of the determinations made pursuant to paragraphs (1) and (2).

(b) ESTABLISHMENT OF SYSTEM- Not later than 60 months after the date of the enactment of this Act, the Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.

(c) EXPEDITED ACTION BY THE ATTORNEY GENERAL- The Attorney General shall expedite--

(1) the upgrading and indexing of State criminal

history records in the Federal criminal records system maintained by the Federal Bureau of Investigation;

(2) the development of hardware and software systems to link State criminal history check systems into the national instant criminal background check system established by the Attorney General pursuant to this section; and

(3) the current revitalization initiatives by the Federal Bureau of Investigation for technologically advanced fingerprint and criminal records identification.

(d) NOTIFICATION OF LICENSEES- On establishment of the system under this section, the Attorney General shall notify each licensee and the chief law enforcement officer of each State of the existence and purpose of the system and the means to be used to contact the system.

(e) ADMINISTRATIVE PROVISIONS-

(1) AUTHORITY TO OBTAIN OFFICIAL INFORMATION - Notwithstanding any other law, the Attorney General may secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, as is necessary to enable the system to operate in accordance with this section. On request of the Attorney General, the head of such department or agency shall furnish such information to the system.

(2) OTHER AUTHORITY- The Attorney General shall

develop such computer software, design and obtain such telecommunications and computer hardware, and employ such personnel, as are necessary to establish and operate the system in accordance with this section.

(f) WRITTEN REASONS PROVIDED ON REQUEST- If the national instant criminal background check system determines that an individual is ineligible to receive a firearm and the individual requests the system to provide the reasons for the determination, the system shall provide such reasons to the individual, in writing, within 5 business days after the date of the request.

(g) CORRECTION OF ERRONEOUS SYSTEM INFORMATION- If the system established under this section informs an individual contacting the system that receipt of a firearm by a prospective transferee would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, the prospective transferee may request the Attorney General to provide the prospective transferee with the reasons therefor. Upon receipt of such a request, the Attorney General shall immediately comply with the request. The prospective transferee may submit to the Attorney General information to correct, clarify, or supplement records of the system with respect to the prospective transferee. After receipt of such information, the Attorney General shall immediately consider the information, investigate the matter further, and correct all erroneous Federal records relating to the prospective transferee and give notice of the error to any Federal department or agency or any State that was the source of such erroneous records.

(h) REGULATIONS- After 90 days' notice to the public and an opportunity for hearing by interested parties, the Attorney

General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section.

(i) PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS- No department, agency, officer, or employee of the United States may--

(1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or

(2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922 (g) or (n) of title 18, United States Code or State law, from receiving a firearm.

(j) DEFINITIONS- As used in this section:

(1) LICENSEE- The term "licensee" means a licensed importer (as defined in section 921(a)(9) of title 18, United States Code), a licensed manufacturer (as defined in section 921(a)(10) of that title), or a licensed dealer (as defined in section 921(a)(11) of that title).

(2) OTHER TERMS- The terms "firearm", "handgun", "licensed importer", "licensed manufacturer", and "licensed dealer" have the

meanings stated in section 921(a) of title 18, United States Code, as amended by subsection (a)(2).

(k) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated, which may be appropriated from the Violent Crime Reduction Trust Fund established by section 1115 of title 31, United States Code, such sums as are necessary to enable the Attorney General to carry out this section.

SEC. 104. REMEDY FOR ERRONEOUS DENIAL OF FIREARM.

(a) IN GENERAL- Chapter 44 of title 18, United States Code, is amended by inserting after section 925 the following new section:

Sec. 925A. Remedy for erroneous denial of firearm. Any person denied a firearm pursuant to subsection (s) or (t) of section 922--

(1) due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act; or

(2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922, may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or

against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(b) TECHNICAL AMENDMENT- The chapter analysis for chapter 44 of title 18, United States Code, is amended by inserting after the item relating to section 925 the following new item:

925A. Remedy for erroneous denial of firearm.

SEC. 105. RULE OF CONSTRUCTION.

This Act and the amendments made by this Act shall not be construed to alter or impair any right or remedy under section 552a of title 5, United States Code.

SEC. 106. FUNDING FOR IMPROVEMENT OF CRIMINAL RECORDS.

(a) USE OF FORMULA GRANTS- Section 509(b) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3759(b)) is amended--

(1) in paragraph (2) by striking "and" after the semicolon;

(2) in paragraph (3) by striking the period and inserting"; and";

(3) by adding at the end the following new paragraph:

"(4) the improvement of State record systems and the sharing with the Attorney General of all of the records described in paragraphs (1), (2), and (3) of this subsection and the records required by the Attorney General under section 103 of the Brady Handgun Violence Prevention Act, for the purpose of implementing that Act."

(b) Additional Funding-

(1) GRANTS FOR THE IMPROVEMENT OF CRIMINAL RECORDS- The Attorney General, through the Bureau of Justice Statistics, shall, subject to appropriations and with preference to States that as of the date of enactment of this Act have the lowest percent currency of case dispositions in computerized criminal history files, make a grant to each State to be used--

(A) for the creation of a computerized criminal history record system or improvement of an existing system;

(B) to improve accessibility to the national instant criminal background system; and

(C) upon establishment of the national system, to assist the State in the transmittal of criminal records to the national system.

(2) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated for grants under paragraph (1), which may be appropriated from the Violent Crime Reduction Trust Fund established by section 1115 of title 31, United States Code, a total of $200,000,000 for fiscal year 1994 and all fiscal years thereafter.

TITLE II--MULTIPLE FIREARM PURCHASES TO STATE AND LOCAL POLICE

SEC. 201. REPORTING REQUIREMENT.

Section 923(g)(3) of title 18, United States Code, is amended--

(1) in the second sentence by inserting after "thereon," the following: "and to the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction in which the sale or other disposition took place;

(2) by inserting "(A)" after "(3)"; and

(3) by adding at the end "thereof" the following:

"(B) Except in the case of forms and contents thereof regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received. No later than the date that is 6 months after the effective date of this subparagraph, and at the end of each 6-month period thereafter, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall certify to the Attorney General of the United States that no disclosure contrary to this

subparagraph has been made and that all forms and any record of the contents thereof have been destroyed as provided in this subparagraph.".

TITLE III--FEDERAL FIREARMS LICENSE REFORM

SEC. 301. SHORT TITLE.

This title may be cited as the "Federal Firearms License Reform Act of 1993."

SEC. 302. PREVENTION OF THEFT OF FIREARMS.

(a) COMMON CARRIERS- Section 922(e) of title 18, United States Code, is amended by adding at the end the following: "No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.".

(b) RECEIPT REQUIREMENT- Section 922(f) of title 18, United States Code, is amended--

(1) by inserting "(1)" after "(f)"; and

(2) by adding at the end the following new paragraph:

"(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.".

(c) UNLAWFUL ACTS- Section 922 of title 18, United States Code, as amended by section 102, is amended by adding at the end the following new subsection:

> "(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.".

(d) PENALTIES- Section 924 of title 18, United States Code, is amended by adding at the end the following new subsection:

> "(i)(1) A person who knowingly violates section 922(u) shall be fined not more than $10,000, imprisoned not more than 10 years, or both."
>
> (2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.".

SEC. 303. LICENSE APPLICATION FEES FOR DEALERS IN FIREARMS.

Section 923(a)(3) of title 18, United States Code, is

amended--

(1) in subparagraph (A), by adding "or" at the end;

(2) in subparagraph (B) by striking "a pawnbroker dealing in firearms other than" and inserting "not a dealer in";

(3) in subparagraph (B) by striking "$25 per year; or" and inserting "$200 for 3 years, except that the fee for renewal of a valid license shall be $90 for 3 years."; and

(4) by striking subparagraph (C).

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

(2)

Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

No. 95-2006

In the Supreme Court of the United States

OCTOBER TERM, 1995

SAMUEL FRANK, SHERIFF, ORANGE COUNTY, VERMONT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
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13pp

QUESTION PRESENTED

The Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)(2), provides, *inter alia*, that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (CLEO) (the chief of police or sheriff) of the transferee's residence shall make a "reasonable effort" to ascertain whether the transferee's receipt or possession of the handgun would be in violation of the law. The Act also requires (18 U.S.C. 922(6)(B) and (C)) that the CLEO shall, upon request, provide the would-be purchaser with a written explanation of reasons for a conclusion that the transfer would be unlawful, and shall destroy records relating to the transfer upon a conclusion that no legal impediment to a handgun sale exists.

The question presented is whether these provisions of the Brady Act exceed Congress's power under the Commerce Clause or contravene the Tenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-2006

SAMUEL FRANK, SHERIFF, ORANGE COUNTY, VERMONT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 78 F.3d 815. The opinion of the district court (Pet. App. 43a-76a) is reported at 860 F. Supp. 1030.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1996. The petition for a writ of certiorari was filed on June 13, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title I of the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.* (GCA), establishes a comprehensive federal regulatory scheme governing the manufacture and

distribution of firearms in interstate commerce. Under the GCA, it is unlawful for certain persons, such as convicted felons and fugitives from justice, to receive or possess firearms in interstate commerce. See 18 U.S.C. 922(g). Under the GCA, it is also unlawful for any person to transfer a firearm to another, knowing that the transferee is prohibited by Section 922(g) from receiving or possessing a firearm. See 18 U.S.C. 922(d).

In the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (Brady Act or Act), Congress amended the GCA to address the national "epidemic of gun violence" by enhancing enforcement of its restrictions on gun transfer. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). The Brady Act requires the federal government to establish a national instant criminal background check system by November 30, 1998. 18 U.S.C. 922 note. Once that system is in place, firearms dealers will be required (with certain exceptions) to refer any proposed firearm transfer to the system to determine whether any legal impediment exists to the sale. 18 U.S.C. 922(t)(1)(A).

Because the national instant criminal background check system may not be fully operative until late 1998, Congress also enacted interim provisions to enhance enforcement of the GCA's transfer restrictions. Those interim provisions, which are the subject of this case, operate in relation to proposed transfers of handguns by federally licensed firearms dealers. Under the interim provisions, firearms dealers who propose to transfer a handgun must provide the "chief law enforcement officer" (CLEO) of

the transferee's residence[1] with information about the proposed transfer, and may not make the transfer until five business days have elapsed after providing such notice. See 18 U.S.C. 922(s)(1)(A). If, within that five-day period, the CLEO informs the dealer that the CLEO has no information that the transferee's receipt or possession of a handgun would be illegal, then the transfer may go forward. See 18 U.S.C. 922(s)(1)(A)(ii)(II). The transfer may also go forward after five days if the dealer receives no information from the CLEO at all. See 18 U.S.C. 922(s)(1)(A)(ii)(I).

To enable CLEOs to determine whether receipt of a handgun would be illegal, prospective gun purchasers must provide firearms dealers with their name, address, and date of birth. 18 U.S.C. 922(s)(1)(A)(i)(I) and (3)(A). The dealer then must pass on the content of the statement to the jurisdiction's CLEO. 18 U.S.C. 922(s)(1)(A)(i)(III) and (IV). During the ensuing five-day waiting period, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law,

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[1] The Brady Act defines the "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8). The Brady Act's interim provisions do not apply in States and Territories that have their own background check requirements. 18 U.S.C. 922(s)(1)(C) and (D); see 59 Fed. Reg. 37,534 (1994).

> including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. 922(s)(2).

Shortly after enactment of the Brady Act, the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (ATF), which is charged with interpretation and implementation of the GCA (see 18 U.S.C. 926; 37 Fed. Reg. 11,696-11,697 (1972)), issued an open letter providing guidance to CLEOs on, *inter alia*, the "reasonable effort" provision. See 95-1478 U.S. Resp. App. at 13a-17a.[2] ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," *id.* at 15a, "[e]ach * * * CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction," *id.* at 14a-15a. ATF further explained that, while the Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." *Id.* at 13a-14a. ATF also made clear that, since the "vast majority of [disqualified] persons * * * are prohibited by virtue of some criminal background," a CLEO's reasonable effort should

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[2] "95-1478 U.S. Resp. App." refers to the appendix to the United States' response to the petition for a writ of certiorari filed in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996). We have provided petitioner with a copy of that response.

normally focus on criminal history records. *Id.* at 14a. Finally, ATF noted that, in some limited circumstances, such as when the CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do no research at all. *Id.* at 14a-15a.

The Brady Act does not require that a CLEO act to prevent the transfer of a handgun if the CLEO concludes that the purchaser's receipt of the gun would be illegal. Thus, if the CLEO determines, for investigative or law enforcement purposes, that the transfer should be permitted to go forward, the CLEO may decline to inform the firearms dealer that the transfer is unlawful. If, however, the CLEO finds no impediment to the proposed handgun sale, the records related to the referral from the firearms dealer must be destroyed. 18 U.S.C. 922(s)(6)(B)(i). And if the CLEO determines that the prospective purchaser's receipt of the handgun would be unlawful and so informs the dealer, the CLEO must, upon request from the prospective purchaser, provide written reasons for the determination within 20 business days. 18 U.S.C. 922(s)(6)(C). The Brady Act provides CLEOs with immunity from damages actions for failing to prevent an unlawful handgun sale, or for mistakenly concluding that a transfer would be contrary to law. 18 U.S.C. 922(s)(7).

2. Petitioner Samuel Frank is the Sheriff of Orange County, Vermont. Pet. App. 3a. He contends that several of the Brady Act's interim requirements violate the Tenth Amendment. He brought suit in district court, seeking a declaratory judgment and an injunction against enforcement of the background-check provision, the requirement of destruction of records relating to background checks, and the

requirement of a written statement of reasons for persons determined by a CLEO to be ineligible to receive a firearm. *Id.* at 50a.

The district court held that the "reasonable effort" provision contravenes the Tenth Amendment. Pet. App. 74a. On that basis, the court enjoined the United States from enforcing the "reasonable effort" provision in Vermont. *Id.* at 75a. The court also held that the "reasonable effort" requirement is severable from the remainder of the Brady Act, including the Act's five-day waiting period for handgun sales. *Ibid.*

3. Both parties appealed, and the court of appeals upheld the Brady Act in its entirety. Pet. App. 1a-39a. The court concluded that "the obligations imposed on CLEOs by the Brady Act do not entrench on those powers reserved to the States by the Tenth Amendment." *Id.* at 32a. In reaching that conclusion, the court determined that the Act's background-check requirement does not "impose[] a structural burden inconsistent with the plan established by the Constitution; nor does it impose an onerous quantitative burden on state or local officials." *Id.* at 21a-22a.

The court stated that, "[t]o help navigate safely through the murky waters of Tenth Amendment doctrine, it is necessary to dispel the notion that the federal government may never compel action by state officials." Pet. App. 18a. The court rejected petitioner's contention that, under *New York* v. *United States*, 505 U.S. 144 (1992), "Congress may never compel state officials to perform duties and may only seek to guide States' behavior by attaching conditions to federal funds, threatening preemption, or passing generally-applicable legislation." Pet. App. 22a. Instead, the court observed, *New York* prohibits the federal government only from "mobiliz[ing] 'the legis-

lative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 22a-23a (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

The court noted that, in a case like *New York*, where the federal government compels States to regulate, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision[s]." Pet. App. 25a (quoting *New York*, 505 U.S. at 169). In this case, by contrast, the court concluded that, "[b]ecause the [Brady] Act neither requires States to enact regulations by requiring them to fashion their own solutions, nor abdicates political responsibility in the handgun field," the Brady Act passes constitutional muster under *New York*. Pet. App. 24a.

The court then considered the extent of the burden that the Act imposes on CLEOs, and found it to be "minimal." Pet. App. 32a. The court explained that, "[a]part from th[e] specific prohibition ['against directing States to legislate or to regulate'], the severity of the burden placed on States is the touchstone for determining whether national legislation is so onerous as to threaten the effectiveness of the States in our federal system." *Id.* at 20a. The court concluded that "the Act is * * * not unconstitutional by virtue of the magnitude of the burden." *Id.* at 32a.[3]

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[3] Before addressing the merits, the panel majority rejected the government's contention that petitioner lacked Article III standing because, after petitioner filed this action, ATF, at

DISCUSSION

The question presented by this petition is the same as the question presented in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996), and *Mack* v. *United States*, cert. granted, No. 95-1503 (June 17, 1996). Accordingly, the petition in this case should be held pending the decision in *Printz* and *Mack*.[4]

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the request of the state safety commissioner, designated a Lieutenant of the Vermont State Police as the CLEO for Orange County, Vermont. See Pet. App. 9a-17a. Judge Miner concurred in the result, and agreed with the government that petitioner lacked standing to sue; he therefore did not reach the merits of petitioner's Tenth Amendment claim. *Id.* at 39a-43a. We continue to believe that petitioner lacks standing, and the doubts about his standing make this case an inappropriate vehicle for plenary review of the Tenth Amendment issue. Even if petitioner has standing, the district court should not have entered an injunction preventing enforcement of the Act's interim duty provisions in the entire State of Vermont, but should have limited injunctive relief to petitioner, especially since other sheriffs in Vermont have not objected to undertaking the interim duties. See Gov't C.A. Br. 45-49; cf. *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1018 (1995).

[4] In our petition for a writ of certiorari in *United States* v. *Koog*, No. 95-2052 (filed June 19, 1996), which seeks review of the Fifth Circuit's decision holding the interim duty provisions of the Brady Act unconstitutional, see *Koog* v. *United States*, 79 F.3d 452 (1996), we similarly suggested that the petition be held pending the Court's decision in *Printz* and *Mack* and then disposed of as appropriate in light of that decision. We have furnished petitioner with a copy of our petition in *Koog*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996), and *Mack* v. *United States*, cert. granted, No. 95-1503 (June 17, 1996), and then disposed of as appropriate in light of the decision in those cases.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JULY 1996

Supreme Court, U.S.
FILED
JUL 26 1996
CLERK

(3)

No. 95-2006

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SAMUEL FRANK, Sheriff,
Orange County, Vermont

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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DISCUSSION

The issues presented in this case are the same as those in *Printz v. United States*, cert. granted, No. 95-1478, (June 17, 1996), and *Mack v. United States*, cert. granted, No. 95-1503 (June 17, 1996). The United States concludes that, for this reason, this case should be held pending the decision in *Printz* and *Mack*. This would be appropriate if each case were founded upon factual circumstances which are substantially identical. They are not.

The legal issue addresses the relationship between the federal government and the governments of the states. Different facets of this issue may be illustrated by different factual circumstances. In petitioner's case, he has only two full time deputies. The Brady law requirements in his county, which has only minimal law enforcement resources, create a unique factual circumstance. Given the facts, this case would present a unique aspect of the legal issue presented in each of the Brady law cases.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit. This Court should consolidate this case with the *Printz* and *Mack* cases, for which certiorari has been granted, and *Koog* and *McGee*, if certiorari should be granted in that case.

Respectfully Submitted,

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